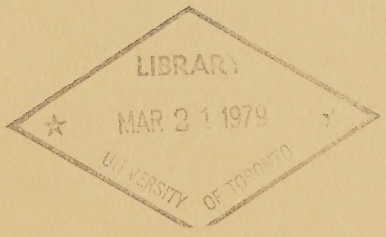
Ontario

Commission on Freedom of Information and Individual Privacy

Information Access and The Workmen's Compensation Board



Research Publication 4

INFORMATION ACCESS AND THE WORKMEN'S COMPENSATION BOARD

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Research Publication 4

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and Individual Privacy

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FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the Government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the Government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the Government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of Government information;

3. The categories of Government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of Government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of Government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 4. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn in having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The present paper is one of a series of such studies conducted by the Commission's research staff and its outside consultants which together attempt to describe the information policies and practices of a number of agencies of the Ontario government, and to explore the possibilities for expanding the current level of citizen access to government information.

Two of these studies, Professor Ison's study of the Workmen's Compensation Board and a study conducted by Professor Connelly of Osgoode Hall Law School, York University, on information access problems related to securities regulation, describe in some detail the information practices of a specific agency. Other studies examine particular kinds of information activities, such as the handling of records containing personal information about citizens, across a broad spectrum of governmental organizations.

Inevitably, any attempt to examine so broad a range of information activity could not be expected to yield an account of the program objectives and the administrative processes in which each and every one of these information activities occurs. The rationale for the two studies of specific agencies then, is to act as a corrective to the more generally conceived inquiries by thoroughly considering the information practices of a particular agency in the light of its overall institutional design, the full range of its contacts with the various segments of the public which it serves, and a clear understanding of the public policy objectives which it has been designed to accomplish.

Professor Ison's study meets this prescription in full measure and provides a very full account of the information access dimensions of the ongoing administrative work of the Ontario Workmen's Compensation Board. The bulk of the Board's work consists, as Professor Ison indicates, of the processing and disposition of claims advanced by injured workers for the determination of compensation under the compensation scheme established by the Ontario Workmen's Compensation Act. It is not surprising therefore, that much of Professor Ison's study describes and evaluates the injured claimant's access to documents in the possession of the Board as an aspect of the claimant's "procedural due process". As the reader will observe, Professor Ison offers some suggestions as to the improvement of current Board practice in this regard.

Professor Ison is well-qualified to undertake a project of this kind. Currently a member of the Faculty of Law of Queen's University, he is a widely known and extensively published expert on administrative law and on the legal problems relating to compensation systems. During the period from 1973 to 1976, Professor Ison served as Chairman of the Workers' Compensation Board of British Columbia and is thus able to draw on his experience as an administrator in this field in presenting an analysis of the Ontario experience.

It should be pointed out that the interviews on which Professor Ison's account of current Board practices is based were undertaken in May and June of 1978. Accordingly, it is possible that Board policy has evolved during the interim prior to publication of this report.

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. Those who wish to communicate their views in writing to the Commission are invited to write us at the following address:

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It should be emphasized, however, that the views expressed in this paper are those of the author and that they deal with questions on which the Commission has not yet reached a final conclusion.

Particulars of other research papers which have been published to date by the Commission are to be found on page 213.

John D. McCamus
Director of Research

INFORMATION ACCESS AND
THE WORKMEN'S COMPENSATION BOARD

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

1. Acknowledgements

I am most grateful for the efficient and cordial assistance of the Workmen's Compensation Board in the enquiries made for the preparation of this Report. I was able to talk to anyone at the Board that I wished, and to see any documents that I wanted to see. The Board did everything that I asked to facilitate my enquiries and could not possibly have been more helpful.

I would also like to thank the several people outside the Board who provided information or ideas in personal interviews or by correspondence, and the Canadian Manufacturer's Association and the Ontario Federation of Labour who were good enough to arrange discussion meetings.

2. Background

By Order-in-Council dated 30th of March 1977, the Government of Ontario established a Commission on Freedom of Information and

Individual Privacy. The members of the Commission are D. Carlton Williams, Dorothy J. Burgoyne and G. H. U. Bayly. The purpose of the Commission is "... to study and report to the Attorney-General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the Government of Ontario...".

As part of its work, the Commission has undertaken a program of background research, including a series of more particular studies. In this connection, I have been retained by the Commission to write this report on Information Access and the Workmen's Compensation Board.

The report draws partly on experience over the years, and partly on research undertaken for the purpose. The experience referred to has consisted of:

a) occasional discussions since 1968 with Board personnel, and others who interact with the Board, and a study of materials from the Board since that time in connection with a course that I gave at Queen's University on Personal Income Security.

b) being on leave during the years 1973-76 as Chairman of the Workers' Compensation Board of British Columbia.

c) participating in three annual conventions of the Association of Workmen's Compensation Boards of Canada, for one of which I organized and chaired a panel discussion on the disclosure or confidentiality of medical information.

d) since 1976, consulting work in relation to workmen's compensation and occupational health and safety.

The research undertaken specifically for this report has included:

a) six days at the Workmen's Compensation Board for discussions and for the perusal of documents.

b) discussions with people outside who interact with the Board, including two discussion meetings, one at the Canadian Manufacturers' Association (Ontario Division) and one at the Ontario Federation of Labour.

c) discussion with staff of the Krever Commission.

d) a perusal of the Canadian literature on workmen's compensation in so far as it relates to the confidentiality or disclosure of information.

The purpose of the discussions with people outside the Board was to obtain information and ideas. But this report was not intended as an exhaustive catalogue of the views of interested people and organizations, and I tried to avoid appearing as the exclusive channel of communication with the Commission. When, therefore, people or organizations expressed an interest in presenting a position to the Commission on any of the matters discussed, I encouraged them to do so by making a submission

directly to the Commission.

The purpose of this report is to produce a synthesis of information, ideas and argument, but not to conclude with specific recommendations.

3. The Criteria of Relevance

The function of the Commission is, of course, different from the functions of the Board, and the range or arguments considered relevant in this report is intended to reflect that difference. The Board has power "to review this Act... and recommend amendments or revisions thereof...".[1] But its primary role is to administer the Act under which it was created, and in so doing, to comply with any other applicable laws of Canada and of Ontario. For the Commission, however, the consideration of legislative change is a primary role. Arguments in support of confidentiality or disclosure which have their genesis in existing legislation will not, therefore, have the same relevance in this report as they have in the administration of the Board.

By agreement with the Director of Research of the Commission, the following topics are excluded from this paper:

a) Personnel Records;

1 S. 70(3).

b) Advice to the Minister on legislative policy;

c) The purchasing of supplies or leasing of premises.

(Whatever the arguments may be for the disclosure or confidentiality of records in those areas, I would not expect them to be different in relation to the W.C.B. from what they are in relation to government departments).

d) Custodial controls. Questions of computer technology and other steps necessary to comply with whatever the rules may be for disclosure or confidentiality. These questions may be covered in the Report of the Krever Commission.

The arguments in support of freedom of information legislation might, perhaps, be divided roughly into two categories.

First, there are the arguments resting on an ideological background and relating to the nature of democratic government. The essence of democracy is the distribution of decision-making power, as far as practicable, among all adult members of society. But knowledge is power, and the concentration of knowledge in the hands of a privileged few can tend to concentrate power in the hands of that same few. Hence the protection of the democratic process requires a critical scrutiny of any restraints on public access to information. Derivative or ancillary arguments may include the propositions:

a) That public access to government information is a control mechanism to prevent impropriety in government.

b) That since the information has been generated by the use of public money, it should be available to the public for private as well as public purposes.

My understanding is that ideological arguments of this breadth will be reviewed in some other paper, or brought to the attention of the Commission in other ways.

Secondly, there are the more specific arguments for disclosure or confidentiality and that relate to particular documents, categories of documents, or situations. These are the arguments on which I will try to focus.

The terms of reference of the Commission, like its title, refer to freedom of information and the protection of privacy. Where, however, the government institution concerned is an adjudicating tribunal, access to information cannot be neatly separated from procedural due process. In this report, therefore, issues of procedural due process are considered to the extent that they involve information flow.

4. Publication

My understanding is that the Commission has it in mind to publish this and other background papers. My suggestion is, however, that it would be more helpful to publish this report now as a working paper, rather than to publish it later as a final document.

First, the preparation of this report has included enquiries among interested people and organizations to the extent possible within the agreed time frame. But these enquiries have not been exhaustive, and there may well be other people who would like to present information or views to the Commission on the matters discussed.

Secondly, of the people contacted in discussion or by correspondence, many had not formulated clear views on many of the matters mentioned in this report. For that reason, although several people expressed an interest in presenting a position to the Commission, their views on many of the questions could not be included in this report. To my suggestion that they could submit their views in a brief directly to the Commission, a typical response was that "We would find it easier to express a position if we had something to react to".

Thirdly, the purpose of this report is to assist the Commission in its search for ways and means of improvement. Thus it is a broad canvas, and it could not be prepared with the more precise techniques that could be used for an inquiry into specific and predefined issues.

Fourthly, this report has been produced single-handed, with secretarial assistance, but without other support staff or the collaboration of colleagues as a check against error or omission. Publication at this stage could, therefore, help to provide that check, and may result in the Commission receiving useful supplementary material.

Fifthly, some of the points discussed briefly in this report might be explored more fully in the work of the Krever Commission. If so, my comments may have some value to them in the initial stages of their work, but be less useful later.

For these reasons, I think this report would be more valuable if published now as a preliminary discussion paper or working paper, than if treated as one of the final documents of the Commission.

5. The Board

The Workmen's Compensation Board has a range of diverse but related functions. First, the Board provides for medical care. In most cases, this consists of paying the medical bills resulting from compensable disabilities. But the Board also provides medical care directly at its Hospital and Rehabilitation Centre in Downsview. Thus it has functions analogous to those of O.H.I.P., but with the addition of some different quality control measures, as well as a responsibility for hospital administration.

Through the provision of vocational and social rehabilitation, the Board has also something the character of a social service agency.

In relation to compensation claims, the Board has administrative, investigative, and investment functions analogous to those of an insurance company; while at the same time, the Board is the adjudicating tribunal.

Except for those employments that are self-insured under Schedule 2 of the Workmen's Compensation Act, the revenue of the system is raised by assessments levied on employers as a percentage of payroll.

In Ontario, the Board is not responsible for health and safety inspections, or for the enforcement of occupational health and safety regulations. But it does participate in the total health and safety program of the Province by:

a) providing claims data to the Occupational Health and Safety Division of the Department of Labour;

b) operating systems of experience rating and penalty assessments;

c) providing financial support, claims data and other information to nine safety associations. These are associations of employers organized by type of industry.

The head office of the Board is in Toronto in an office tower at the inter-section of Bloor and Yonge. The Board also operates two information centres at other locations in Toronto, and twelve offices in other cities.

The Board has seven members (Commissioners). Of these, the Vice-Chairman of Appeals and four Commissioners of Appeals are engaged primarily on the decision of disputed issues at the final level of appeal. For this purpose, they sit in panels of three. The Vice-Chairman of Administration deals primarily with the executive functions of the Board. The Chairman maintains an overview of the whole operation and is engaged very largely in the external relations of the Board. A meeting of the Board as a whole (i.e., all Commissioners who are present and available) is known as a meeting of the Corporate Board to distinguish such a meeting from an Appeal Panel.

At the end of 1976,[2] the total staff of the Board was 1,891. The distribution was: Head Office 1,394, Hospital and Rehabilitation Centre 328, Area Offices 169.

During 1976, there were a total of 433,799 compensation files opened, and a total of $359.9 million was awarded in compensation benefits.

2 The last year for which the Annual Report was available at the time of writing.

About 1,700 new claims are received at the Board each working day, and at any given time about 33,000 lost-time files are in the active category.[3]

3 All figures taken from the Annual Report for 1976.

CHAPTER II

CLAIMS

1. Claims Processing

When the present system of workmen's compensation was introduced in Ontario in 1915, it was to replace tort claims between an employee and his employer.[4] It may be helpful, therefore, to itemize those distinctions between the two systems that are relevant in this report.

First, a successful tort claim usually results in a single judgment or settlement in which a capital sum is awarded to the plaintiff. A single decision resulting in one or two payments is also common in workmen's compensation. But in any serious case involving permanent disability, the decision to allow the claim marks the commencement of a continuing relationship that may include a range of subsequent decisions, for example:

a) determination of a level of pension benefits, and subsequent adjustments to that level;

4 Unlike in England and some other jurisdictions, where workmen's compensation was introduced as a concurrent alternative to tort claims.

b) decisions of expenditures for vocational rehabilitation;

c) expenditures to modify the living accommodation of the worker;

d) requests for special equipment or services.

Secondly, on a tort claim, a judge is expected to decide the case entirely on evidence adduced by the parties. That has never been the position under the Workmen's Compensation Act. The duty of the Board is not simply to "hear and determine" but also to "examine into"[5] all matters and questions arising under Part 1 of the Act. This has always been understood to mean that the Board should be an initiating as well as an adjudicating tribunal, i.e., that it should undertake such examinations and enquiries as it thinks necessary for arriving at a sound conclusion, in addition to considering any evidence and argument adduced by the parties.

Thirdly, in the tort system, uncontested claims are commonly paid or settled by insurance adjusters without any claim reaching the records of a court. In workmen's compensation, however, at least in theory, all claims reach the compensation board regardless of whether they are contested. Hence the bulk of claims reaching the Board are not controversial.

Fourthly, in the adjudication of tort claims, it is normal to find the

5 S. 74(1).

defendant adverse in interest to the plaintiff. Often the same thing is found in workmen's compensation. For example, the claims or appeals of workers are often opposed by a Schedule 2 employer, or by another employer who would be adversely affected by the claim, possibly by being a large employer in the class, or possibly because the class is one to which experience rating applies. But it is also common to find, even in controversial claims, that the worker and the employer are taking the same position. A claim may be denied, a worker may appeal that decision and the employer may be supporting rather than opposing that appeal.

Fifthly, compromise does not have the same role in workmen's compensation as it has in tort liability. Many a tort claim is compromised for less than full damages because liability is doubtful. But if, in a compensation claim, it is an arguable case whether the disability is one arising out of and in the course of employment, the Board must decide that question one way or the other. The claimant is either entitled to all the benefits that the Act provides, or nothing at all. There is no preliminary process of negotiation, and the Board has no jurisdiction to arrive at a compromise under which the claimant would receive something, but less than full benefits.

It may be largely because of these distinctions between the Board and the normal adversary system (which characterizes many administrative tribunals as well as the courts) that the Board is not subject to the

Statutory Powers Procedure Act, 1971.[6]

A claims file is normally opened when the Board receives a Form 7 ("Employer's Report of Accidental Injury or Industrial Disease"), or a Form 8 ("Doctor's First Report"). The Form 6 ("Employee's Report of Accident") is not generally used now in Ontario, although it is still used in exceptional situations.

An adjudicator determines whether a claim can be decided on the documents already received, or whether some further enquiry or investigation is needed. Meanwhile, the worker concerned is sent a Form H1, informing him that "We have been notified of your accident...". The reverse side of the Form is a page of information about how the system works. When the Forms 7 and 8 have been received, and if they appear to be complete and in order, the adjudicator may allow the claim, and the first cheque is processed. In cases that appear straightforward, claims are paid for the first week and sometimes longer, from a Form 7 without waiting for a Form 8.

If a claim can be allowed without enquiry and is likely to be short-term, it is decided in the Primary Adjudication Compensation Section of the Claims Adjudication Branch, and is administered to termination in that Section. It is transferred to an Extended Disability Compensation Section if:

6 Workmen's Compensation Act, S. 79 (2).

1) some enquiry or investigation is required to determine whether the claim should be allowed;

2) it is a disability of a type likely to last over thirteen weeks; or

3) the claim has reached thirteen weeks.

Non-controversial decisions are notified to the worker by the cheque, and to the employer by a monthly cost statement.

When an adjudicator concludes that a claim should be disallowed, the file is passed to a senior person in the Claims Review Branch with a memo indicating the proposed decision. If he concurs, the claim is disallowed, and a letter of decision is sent from the Claims Review Branch. A similar procedure is followed if a claim is protested by an employer, and the adjudicator concludes that the claim should be allowed. An adverse decision is accompanied by a pamphlet explaining the opportunities for appeal.

If an employer protests a claim and it is allowed, the worker is not notified of the protest. If a claim is listed for local investigation, the worker would be told that it is being investigated, but not told of the protest.

The worker and employer are told of pending field investigations. Workers are allowed to have a representative at a field enquiry, but the employer is not allowed to be present when the worker is being interviewed. Each is interviewed in the absence of the other.

Workers are not usually told in advance that they may have a representative present at a field interview. It used to be a normal routine to explain this in a letter. But that was stopped, partly because it was thought to cause unnecessary suspicions, and partly because it resulted in delays and extra workload in the arrangement of field interviews. It is, however, still done in some situations, for example:

1) Where a union official is already involved in the claim and has indicated a desire to be present.

2) Where the worker has some difficulty in expressing himself, perhaps because of a language problem.

3) Where the worker is young (in these cases, the Board suggests that a parent be present).

4) In a fatal case, where a lawyer is acting for the widow, perhaps in administering the estate, and has indicated a desire to be present.

The Board operates on a procedural due process model in its appeal system to a greater extent than in decisions made at first instance.

Where an employer has protested a claim, and the adjudicator, with the concurrence of the Claims Review Branch, feels that the claim should be allowed, a telephone call is made to the employer to explain and discuss the pending decision. That telephone call provides the employer with a last chance to submit any further evidence or argument before the claim is decided. But there is no comparable procedure applicable in every case for communicating with a worker prior to the denial of a claim.

In many cases where a claim is denied, the worker will have become aware of the difficulties in the claim, and will have had an opportunity to present evidence and argument. In some cases, the worker may have completed a Form 6, and the claim may have been disallowed even after accepting the truth of everything he says. In other cases, there may have been telephone discussions, or field enquiries, or correspondence in which the worker was informed of the difficulties in allowing the claim, and given an opportunity to present evidence and argument. But there is nothing in the system to ensure that systematically and in <u>every</u> case before a claim is denied, the worker will:

a) be informed of what the difficulty is in allowing the claim and,

b) have an opportunity to submit evidence or argument before the decision is made.

This may partly explain some of the problems of image and attitude with which the Board tries to cope. The written and oral statements of some M.P.P.'s and other representatives of workers often refer to the process of representing workers as "fighting the Board". If someone with a serious disability finds that his claim has been denied on the face of documents that he never wrote by a person who has never seen or heard him because of objections that he never had a chance to rebut in any discussion with the person making the decision, it would not be surprising if, in at least some cases, the reaction to such peremptory procedures might be to perceive the Board as a bureaucratic enemy.

Moreover, first impressions can have a more profound impact than subsequent decisions. If the confidence of a worker in the Board is shaken, that may have a negative effect on future co-operation for rehabilitation purposes, and may even have a negative effect on treatment. Also confidence once shaken may not be entirely restored by a subsequent reversal of the initial decision on appeal. An impression may be left upon the worker that compensation is being paid grudgingly, and only because he "made a fuss".

Procedural due process at the first level of decision-making is also important in any compensation board to ensure that decisions are

reached according to the justice and merits of individual cases, rather than by a balancing of lobbying pressures.

> "Consider the pressures operating on a workers' compensation board in relation to claims. Employers and employers' organizations may be pressing for a reduction of claims and administrative costs. Workers and unions may be pressing for greater claims' payments and better services. Because of the principle of collective liability, the employers' lobbying is most likely to relate to the aggregate, while the attention of workers and unions is more likely to focus on a small minority of individual claims. If any board lacks the integrity, understanding or ministerial support to resist the lobbying, it can accommodate both pressures by adopting different standards for different levels of adjudication. At first instance, decisions can be based on the face of the injury reports and reached in a peremptory way, following the general principle that if a claim looks at all doubtful, reject it and see if the worker complains. Not only will this minimize the total payment cost of claims but it will also minimize the administrative costs. For those workers who complain, a proper enquiry can be commenced and a proper adjudication can be made in the appeal system. The impropriety of this should be obvious; so too should its adverse affect on medical treatment, on the motivation and confidence of the worker, and on his rehabilitation."[7]

That passage was not written as a description of the Board in Ontario, or of any other particular compensation board. Rather it was written to show why procedural due process is more vital on initial claims decisions than on appeals, and essential if any compensation board is to satisfy its constituency, and itself, that its decisions are made according to the justice of individual cases rather than reflecting an accommodation of lobbying pressures.

7 "The Intrusion of Private Law in Public Administration", T.G. Ison, (1976) 17 Cahiers de Droit 799, 811.

In Ontario in particular, this problem may have been aggravated by the focus of the legal mechanisms for outside scrutiny of Board decisions; i.e., judicial review[8] and the Ombudsman. These have focused on the final level of appeal rather than on decisions at first instance.

> "Proposals sometimes emerge from among the legal profession that would aggravate rather than alleviate the problem. One is that after a final decision on appeal within the Board, a further review of claims decisions should be possible outside the Board, either by appeals to courts or by an Ombudsman. .....The need for outside surveillance to maintain the quality of decision-making in workers' compensation is not for a further level of appeal, but for automatic inspection to monitor the quality of decisions made at first instance."[9]

> "Another example might be seen in the administration of welfare benefits. A welfare department in a particular jurisdiction may have established a system of appeals to deal with complaints, or there may be a statutory system of appeals. To keep his case-load within manageable limits, an ombudsman may well insist that he is unavailable to welfare applicants until the appeal procedures have been exhausted. But consider where, among the total universe of welfare applicants, the greatest incidence of injustice is most likely to be found. Would it be among those, perhaps the more aggressive personalities, who have been through the appeal system, had their grievances found unjustified, and now wish to appeal beyond? Or would it be among those, perhaps more timorous souls, who have accepted an adverse decision made at first instance, perhaps because they accept without question any decision of anyone in authority? Even people who are normally self-confident or demanding can become quiescent when afflicted by disability, unemployment, marital desertion, or other problems of welfare applicants."[10]

8 Judicial review of Board decisions is extremely rare, but it has been influential. In particular, the decision in R. v. W.C.B. ex parte Kuzyk (1968) 2 O.R. 337 resulted in access to file documents in the appeal system, but not for decisions at first instance.

9 Supra, fn. 7, p. 812.

10 Ibid., p. 809.

Although the Board is not bound by the Statutory Powers Procedure Act, Section 79 (1) of the Workmen's Compensation Act provides that the Board "shall give full opportunity for a hearing" before making "any decision". Obviously that cannot be read literally. The bulk of compensation claims are non-controversial, and the Board is no doubt right in its view that the typical injured worker would rather receive a cheque in the mail than a notice of opportunity to be heard. In practice, the Board interprets that sub-section as applying only to the appeal system. For the reasons explained above, however, it is suggested that where an issue is raised by the Board or by the employer which might be decided against the worker, the opportunity to be heard is much more important at the initial decision-making stage than at the final level of appeal. (Incidentally, Section 79 (1) may be of collateral interest as an example of a tendency to legislate procedural rules with serious and controversial cases in mind, and to overlook the practice in non-controversial cases).

For the Board to discuss a pending adverse decision with the worker concerned by telephone, as it now does with employers, may be impracticable in many cases. Workers tend to be less accessible by telephone than employers. But a letter could be used to serve the same purpose.

A possible improvment might be to identify a category of situations in which an opportunity to be heard is important prior to the initial decision, possibly some revision of the category of matters now referred to the Claims Review Branch. In those cases, the questions could then be

considered:

a) Has the worker been informed exactly what the difficulty is in reaching a conclusion in his favour.

b) Has the worker been allowed some opportunity (whether by telephone, correspondence, or field interview) to present any available evidence or argument to meet that difficulty?

If those questions cannot be answered affirmatively at that stage, a letter could be sent advising the worker exactly what the difficulty is in reaching a conclusion in his favour, and inviting any submission that he may wish to make (by telephone, letter or interview) before the decision is made.

The company representatives to whom I spoke felt that information from the Board to them is satisfactory with regard to initial decisions. But some of them felt that employers should receive notice of a worker's request for the re-opening of a claim, and also notice when a pension assessment is about to be made.

As mentioned earlier, the initial decision of compensation claims is by a single employee of the Board (a Claims Adjudicator). This is normal in the Canadian compensation boards, and given the volume of claims involved, is inevitable, at least for the majority of claims. But it does not appear to be reflected in, or even authorised by, the

terms of the Act.

S. 76(1) appears to contemplate that all applications will be decided by "the Board", three Commissioners constituting a quorum. S. 77(1) provides for a decision by a single Commissioner, and S. 67 authorises the Board to act upon the report of any of its officers. But there is no authority for the long-standing and inevitable practice of claims adjudicators making initial decisions.

I am not aware of any important practical problem here. But the contrast on this point between the way the Board works and the way the Act reads has caused confusion from time to time. The Act is a primary document to which interested members of the public refer for an understanding of the Board, and it could be helpful if, when the Act is next revised, the decision-making provisions are rewritten to accord with the practice.

There may also be a point of principle here. If some provisions of the Act are so written that they must be ignored, the Board is forced to make a judgment about which provisions in the Act will be followed, and which will not. That is surely incompatible with the sovereignty of the legislature, and tends to undermine fidelity to law.

2. Appeals

The claims adjudicators and the Claims Review Branch are part of the

Claims Services Division, which is organized under an Executive Director. Appeals from their decisions go to the Appeals Branch, which is separately organized under the Vice-Chairman of Appeals.

There are no formal documents required or supplied for the commencement of an appeal. Any letter indicating an intention to appeal is sufficient. Very often, however, letters of complaint are received from which it is unclear whether the writer wants to appeal, or wants a better explanation of the initial decision. A screening process is carried out in the Appeals Branch, and sometimes a letter of explanation is written before a complaint is treated as an appeal.

The first level of appeal is to one of thirteen Appeals Adjudicators. These are senior claims personnel on the staff of the Appeals Branch.

From the decision of an Appeals Adjudicator, a final appeal lies to an Appeal Board, consisting of three Commissioners. If he thinks it appropriate, an Appeals Adjudicator can refer an appeal to an Appeal Board without first making a decision.

Most appeals relate to claims decisions. But an appeal can be taken from a decision made elsewhere in the Board; for example a decision relating to a rehabilitation expenditure, or an assessment.

The Appeals Adjudicators are not involved in assessment appeals. These go direct to an Appeal Board (except for appeals relating to a special

assessment for late filing of a Form 7).

If an Appeal Board feels that there ought to be a change in Board policy to arrive at the right conclusion, the matter is referred to the Corporate Board (i.e., all Commissioners, with a majority constituting a quorum). The proposed policy change would then be considered by the Corporate Board in a quasi-legislative manner, i.e., discussed internally, but without hearing further arguments from the parties to the particular appeal.

Where a hearing is conducted by an Appeals Adjudicator, a transcript is taken by a court reporting firm. A copy of that transcript is supplied without charge to either party on request. When it is requested by one party, it is automatically supplied to the other even if that party did not appear at the hearing.

A transcript is taken at a final hearing by an Appeal Board, but is not usually typed. A copy will be supplied to a party on request. But, unless the Board has it typed for its own purposes, a charge will be made for the production cost.

Outsiders, such as newspaper reporters, do not normally wish to attend appeal hearings. They are allowed if both parties agree. Otherwise they are excluded.

The Appeals Branch does not offer advice on whether to appeal. Anyone appearing to need such advice would normally be referred to one of the counsellors in the Claims Services Division, or to a Workmen's Adviser.

The lack of formality for the commencement of an appeal has obvious advantages. Any "Notice of Appeal" form might contain questions that a worker, particularly at a time of distress, could find bewildering, and this might discourage legitimate appeals. Without formal requirements, an aggrieved worker can express himself in his own terms without having to fit his grievance into any categories that he may not understand. Some people, however, may find it easier to complete a form than to write a letter.

Two workers' representatives expressed the view that it would be helpful to receive a "Notice of Appeal" form when responding to an appeal by an employer. It was suggested that the following information would be helpful:

1) Where the Board has made several decisions on the claim, exactly which of those decisions is the employer appealing from.

2) A note of the grounds of the appeal.

3) In general terms, what type of person will represent the employer at the hearing (personnel officer, lawyer, etc.).

One possibility might be to devise a simple "Notice of Appeal" form that could be made available to workers and employers, but making the use of that form optional.

At the first level of appeal (to an Appeals Adjudicator) a judgment is made whether to decide the appeal with or without a hearing.[11] At the final appeal to an Appeal Board, a hearing is the standard practice.

Apart from the appeal procedure mentioned above, the Act also provides for a reference to a Medical Referee.[12] In practice, the decisions of the Board on whether to refer a claim to a Medical Referee are made by an Appeal Board, so that these references are an off-shoot or adjunct of the final level of appeal.

Very few references to a Medical Referee are made. For example, during the period 1st January to 31st of May 1977, there was one reference. During the same period in 1978, there were three references.[13] These references usually result from an application to the Board for reconsideration of an appeal decision, or result from a complaint to the Ombudsman.

11 During January 1978, Appeals Adjudicators rendered 42 decisions following enquiry or hearing, and 69 decisions without enquiry or hearing. (Figures supplied by the Board).

12 S. 22.

13 Figures supplied by the Board.

The Board prepares a direction for the Medical Referee indicating the questions to be answered. A medical summary is also prepared by a consulting surgeon on the staff of the Board. These documents are prepared in the Medical Services Division of the Board, and they go to the Medical Referee together with the claims file.

The parties to the claim do not receive a copy of the direction to the Medical Referee, and the attending physician does not receive a copy of the medical summary. It is difficult to find any explanation for this, except that the proceeding might be perceived as a process of medical enquiry rather than a legal process of claims adjudication. Be that as it may, the effect of not supplying copies of the direction to the parties is that the worker and the employer do not have an opportunity to check the accuracy, relevance, or legality of what the Medical Referee is being told. Consequently, they have no opportunity to submit any argument to the Appeal Board on what the Medical Referee ought to be told. For example, a medical referee might be asked to certify as to the fitness of a worker for his employment. But what assumptions is the medical referee expected to make about what the employment involves? If he is receiving a statement of that from the Board, surely the parties should have an opportunity to ask for corrections or additions to the statement. Is the Medical Referee to find out what the job involves by questioning the worker? If so, the employer, if he is opposing the claim, has no opportunity to respond. Again, if the claim is for industrial disease, the Medical Referee may be required to certify as to the cause of the unfitness. But he may be

unable to determine that without an occupational history. Is that being supplied by the Board? If so, then again surely the parties should have an opportunity to ask for corrections or additions. If an occupational history is being taken by the Referee from the worker, neither the employer nor the Board has any opportunity for comment or correction.

Similarly, an opinion on diagnosis might depend partly on the exposure of a worker to contamination. Is the Medical Referee using exposure data supplied by the Board, and perhaps originating from the Department of Labour or from the employer? If so, surely the worker or his union should have an opportunity for comment or correction.

Perhaps what is most important in practice is that the parties be informed about the assumptions of law that the Medical Referee is being asked to make. In particular, the way in which a direction is worded can communicate to the Referee an impression of the evidentiary standards required, and of the assumptions to be made in the absence of evidence.

Unless the parties are aware of exactly what the Medical Referee is receiving by way of input, they have no opportunity of checking the accuracy and legality of material that might be critical in shaping the Referee's conclusions.

A Medical Referee reports to the Board in one document, which becomes

the certificate referred to in S. 22. A copy of that certificate is not provided to the worker.[14] It is, however, Board policy to send copies of the certificate to the representatives of parties.

3. Personal Inter-Action on Claims Matters

a) Background

As mentioned above, each claim is assigned to an adjudicator for initial decision, and for continuing administration. Other Board staff are, however, also involved in dealing with the public in relation to a claim.

In the court system, the adjudication of disputed claims involves the accumulation and syntheses of evidence and argument by the parties or their advocates, and its presentation at a single event, the trial. There is usually nothing equivalent in the initial decision of compensation claims. Evidence and argument are accumulated and synthesized by the Board itself. The input is received in standard forms, in letters, in telephone conversations, and in field interviews.

14 Whether it should be provided to the worker, or to the employer, are matters that fall within the discussion below on the disclosure or confidentiality of medical information.

Not only does the information and argument relating to a claim come to the Board on different occasions, but it is also inter-mixed with other types of communication. For example, a telephone call from a worker to enquire "Has my cheque been sent?" might become the conversation in which the worker presents his argument on why the claim should be allowed.

Similarly, personal inter-action after a decision has been made does not always fit into predictable categories. If a worker wants a discussion following a claims decision, for example, it may not be clear in advance whether the worker will be asking for a better explanation of the decision, applying for reconsideration, initiating an appeal, or making an enquiry on a collateral matter.

Procedural due process as well as efficiency in claims adjudication should surely be advanced if the adjudicator deciding each claim deals personally with all information flow relating to that claim, including all interviews and telephone enquiries. On the other hand, efficiency in claims adjudication would also be advanced if each adjudicator is free to analyse the material and think about the decision on a particular claim without being interrupted by telephone calls relating to other claims. To some extent, these are conflicting objectives, and some element of compromise is inevitable.

All claims decisions are made at the head office of the Board in Toronto. All claims adjudicators are located there, and it is also

the place from which all cheques are issued.[15] Claims counsellors are available at the head office, and at the other fourteen offices.

b) Enquiry Clerks

Each group of adjudicators is supported by a group of telephone enquiry clerks. Similarly, each local office of the Board has staff dealing with claims enquiries made either by telephone or at the counter.

To deal with routine enquiries of an administrative nature (such as "Is my cheque in the mail?"), the basic data relating to each claim are recorded on magnetic tape, and can be read on a video screen by telephone enquiry clerks and receptionists, as well as adjudicators.

All incoming enquiries relating to claims go to an enquiry clerk unless the caller has asked for a particular person or extension number and the enquiry has gone elsewhere.

During the preparation for this Report, I sat for a while with some of the enquiry clerks in an Extended Disability Compensation Section. In receiving incoming enquiries, they always gave their names at the

15 Except for emergency payments, which may be made out of an impressed account at a local office of the Board.

beginning of the conversations. If the information requested could not be supplied immediately, and it would be necessary to phone back, they gave their names again and more distinctly at the end of the conversations.

There are no firm rules about what communications can be dealt with by the enquiry clerks, and what must be referred to adjudicators. Primarily, this depends on the caller. If an incoming enquiry is one that cannot be answered from the video screen, the caller will be put through to the adjudicator if he specifies that that is what he wants. Otherwise the enquiry clerk would request the file and look for the answer.

Many incoming enquiries relate to payments (either initial or continuing payments) and the enquiry clerks tell people what further information or report is needed before the expected payment can be made.

As well as responding to incoming enquiries, the enquiry clerks also initiate enquiries, either at the request of the adjudicator, or on their own initiative. For example, in one enquiry received while I was there, the worker enquired why the cheque was delayed. The enquiry clerk explained that no medical report had been received. Then she phoned the doctor's office to try to obtain the report.

The system seemed to be working well for straight-forward enquiries to which there are clear answers, such as "How much a week will the

compensation be?". But I felt that it would help to have a defined category of matters that must always be referred to the adjudicator. For example, in response to one enquiry about non-payment, the enquiry clerk explained that the medical report was inadequate, and she suggested that the claimant tell the doctor that the Board needs a more detailed medical report. That would surely create a risk of the doctor sending in more details, but still not relating to the issue that the adjudicator is concerned with. If that enquiry had been referred to the adjudicator, he could surely have specified exactly what further details are needed.

Workers' representatives to whom I spoke felt that, except when the lines are too busy, the system works well in providing information of a type that is available on the video screen. But they mentioned problems of delay, unresponsive answers, and difficulties in getting through to adjudicators on other matters. Company representatives to whom I spoke felt that the process of enquiry and response usually works well, but they mentioned difficulties in obtaining responsive answers to questions about what is happening in the recovery of over-payments.

c) Counsellors

For workers, employers, or representatives who want to discuss a claim, the Board has a staff of officials known as "counsellors". The counsellors are not responsible for claims decisions, although of

course they may have an influence. For example, a counselling interview may be followed by a memo on the file communicating information or impressions to the adjudicator. Counsellors also assist in making other arrangements or appointments that may be needed. For example, if the worker is short of funds, and if it appears from the file that money is due to him, but the exact amount remains to be calculated, a counsellor may arrange for an advance pending the adjudicator's decision on the final amount.

The counsellors are grouped in categories according to their experience, and the matters for discussion are distributed among these categories according to the likely complexity of the matters to be discussed.

Parties to a claim are not precluded from communicating directly with the claims adjudicator, and they too hold interviews. Some worker representatives, when they want to discuss a claim, always ask to speak to the claims adjudicator, and subject to the possibility of delay or other difficulties, they are allowed to do so if they insist that that is what they want. The system is designed, however, to divert enquiries and discussions away from adjudicators as much as possible, and to have enquiries that are too complex for the enquiry clerks or receptionists directed to the counsellors.

This system has the advantage of allowing adjudicators to think about each claim and arrive at a conclusion with the minimum of interruption for other matters. But it has the disadvantage that a greater number

of people can be involved in the administration of each claim. There is no single person who is both responsible for making the Board decisions, and also the person who communicates with the parties and others in relation to the claim.

The Board is sometimes perceived as an impersonal bureaucracy, to be viewed sceptically and not to be trusted. This image is surely aggravated if each encounter with the Board by a disabled worker in relation to his claim involves dealing with a stranger. Attitudes of confidence and trust may be easier to establish between people than between a person and an institution. With the counselling system as it operates in Toronto, a disabled worker attending for an interview does not meet the person responsible for making the decisions on his claim, nor does he derive the confidence that comes from past experience in dealing with the same person, or from the expectation of dealing with the same person in the future. Moreoever, a worker may feel sceptical about the reliability of what he is told if he knows that the person to whom he is speaking has no continuing responsibility for the decisions on his claim.

The counsellors that I met were trying to establish a personal rapport. Each counsellor would give to each person being interviewed a card with his name, position and phone number. This may help to provide some continuity of personal contact. But it could not overcome the recognition that the person to whom the worker was speaking was not the person responsible for the decisions on the claim, nor necessarily the person to whom he would be speaking in

future.

Incidentally, there was a perceptible difference between a counselling interview that I observed at a local office of the Board and counselling interviews in Toronto. At the local office, the counsellor and the claimant knew each other from previous contact. Hence the interview began with both people being at ease, and it ended with an expectation of the worker that in any future discussion with the Board, he would be talking to the same person. Conversely, in Toronto, each interview began with the normal apprehensions of a meeting between strangers and ended without the expectation of a continuing rapport between the same two people.

Another difficulty with the counselling system is that the role involves some ambivalence, which could in turn be a cause of suspicion. It is sometimes difficult in counselling interviews to know whether the counsellor perceives of himself as a representative of the Board in dealing with the worker, or a representative of the worker in dealing with the Board.

d) An Alternative Structure

The counselling model provides an opportunity for people to discuss their claims with someone at the Board. Many people come to the head office of the Board every day for this purpose without an appointment. When that happens, the file is obtained and a counsellor is assigned

to discuss it with the worker. Encouraging interviews without appointments, however, has the disadvantage that the worker must wait while the file is located.

An alternative structure might be to blend the functions of adjudication and counselling, so that all discussions about a claim, beyond the basic enquiries that the telephone enquiry clerks can handle, would be the responsibility of the adjudicator. Possibly field investigations could be included. This model would become more compelling if the Board moves to the decentralization of claims adjudication, making the adjudication of claims a function of the local offices.

On this model, the case-load of each adjudicator, measured in numbers of claims, would need to be substantially reduced. But this could be accommodated by a reduction in the staff assigned to counselling and field investigations.

This model would, of course, also have its limitations. Because of turnover among adjudicators, absences for vacations, sickness or other reasons, continuity of contact between the adjudicator and others affected by the claim (usually the worker, employer, and attending physician) could not be maintained all the time. But it could be maintained to a greater extent than under the counselling model.

Again, efficiency in claims adjudication requires a sensitive understanding of the position of the worker, and of others affected

by or concerned with the claim. The more the system is designed to insulate adjudicators from personal interaction with people outside the Board, the more difficult it may be to develop and maintain that understanding.

The alternative model suggested may also have the advantage of promoting a sense of personal responsibility for the decisions relating to a claim, and for its continuing management. When the decision-making and communications functions relating to a claim are distributed among different people, there is surely a greater risk of inconsistency and confusion.

Again, many claims decisions involve issues of credibility, or issues that require for their resolution a detailed picture of what occurred. Rational decisions on questions of that kind are surely impeded more than they are advanced if the adjudicator does not receive the evidence first-hand from the witnesses. In one counselling interview that I observed, for example, the worker was making an application for re-opening because of a recurrence of disability. The whole counselling interview was, in substance, a process of taking the evidence from the worker relating to the recurrence. For the adjudicator to receive that evidence in the form of a memorandum from the counsellor could not possibly have the same impact as listening to the evidence.

The counselling model may also tend to promote the use of standard rules of thumb in the adjudication of claims to a greater extent than

is desirable, and to a greater extent than the alternative model suggested. For example, a question commonly asked in the bad-back cases is "When this pain occurred at...o'clock, did you mention the onset of pain to fellow workers?". If an adjudicator is constantly receiving answers to questions of that kind in the form of memoranda of interviews, or transcripts of interviews, there is an obvious risk that he will come to attach a standard significance to the answers. Receiving the answers in a personal interview would be infinitely better in enabling the adjudicator to consider the variables relevant in understanding the significance of the answer from the particular worker. From continuity of contact, or from supplementary questions, the adjudicator might readily be able to determine whether the worker is a belligerent and talkative type who would always complain to fellow workers about anything, or a more quiet and proud type who may be more prone to suffer in silence.

As mentioned earlier, the more serious or more difficult compensation claims involve a continuing relationship between the worker and the Board, and a series of decisions made intermittently, or over a continuing period. Thus when a discussion takes place between a worker and a Board representative, it is not always clear at the beginning whether the discussion will be an explanation of a previous decision, a prelude to the next one, an enquiry about long-term prospects, or some other type of discussion. When, however, the purpose of the discussion is to obtain a further or different decision from the Board, it might well be argued that the counselling model is a denial of due process. The worker presents his argument to one

person while the decision is made by another.

With the alternative model, an adjudicator would have greater opportunities for seeing and hearing the worker, the employer's representative, and any witnesses, and a greater opportunity for putting to them the questions that the adjudicator has decided are relevant in deciding the claim.

Again, it is an old adage that every story loses something in the retelling. The presentation of evidence and argument through an intermediary can never be as efficient as its presentation directly to the decision-maker.

The Board has, incidentally, adopted this view in the recent revision of the appeal system. A Report of the Commissioners of the Board preceding that revision concluded that:

> "The practice of placing the responsibility on one person (a Commissioner) of making a decision on a matter heard by another (an Appeals Examiner) is questionable in law and unsatisfactory in operation."[16]

Outside the Board, the matter has been seen the same way.

16 Report and Recommendation of the Commissioners to the Corporate Board with respect to the Appeals System, 4th April 1977, published in the Third Report of the Select Committee on the Ombudsman, 1st Session 31st Legislature, Ontario, 1977, Schedule E.

> "The real and basic reason for a viva voce hearing is for the parties to meet face to face and to listen to the Claimant's side of the story. Not only hear his story but also to watch him when he responds to the questions asked of him, this is most important. An answer written down for someone to read, without seeing the person giving the response could have a very different meaning to a person not present at the hearing. Especially when it's a controversial question dealing with the credibility of the party being questioned."[17]

That comment was also made in relation to the appeals system. But it might equally well have been made in relation to the decisions made at first instance.

Another factor may be that if adjudicators are operating with a heavy case-load and engaged primarily in reviewing and reacting to file documents, there may be a tendency for the job to appear monotonous, and of a clerical nature. A smaller caseload and more personal contact with the people affected by their decisions may add a more demanding variety of experience, and hence more job satisfaction.

e) Counselling Specialists

Apart from the claims counsellors, there is a special and more senior group known as "Counselling Specialists". There are seven of them located in offices on the executive floor.

17 Brief of the Provincial Building and Construction Trades Council of Ontario to the Minister of Labour, 30th January 1977, p. 11.

This group deals with enquiries and problems from M.P.'s, M.P.P.'s, union officials, some employers' organizations, some injured workers' organizations, and some other groups. They also deal with enquiries from some company safety officers, and some personnel officers.

Each counselling specialist deals with people in all of these groups. The distribution of work among them is on a geographic basis.

People in the groups mentioned above do not go to a "counselling specialist" with every enquiry or problem. They may still direct more routine matters to the enquiry clerks, claims adjudicators, or claims counsellors. As one of the counselling specialists put it, the counselling specialists are there to deal with or head off major problems; or as a union official put it, they help to sort out a claim when it has become "fouled up".

Unrepresented workers are not sent to the counselling specialists in the first instance. But they may be directed there if they are not satisfied with the answer received from a claims counsellor on the 7th floor.

Some of the problems reaching the specialist counsellors result from inconsistent positions being taken by different officials at the Board, or inconsistent decisions between departments of the Board. In a case of that kind, the counselling specialist may try to co-ordinate the decision-making, and to co-ordinate the information flow.

If a counselling specialist finds something that appears to be wrong, this would be drawn to the attention of the operating department. When the decision on what to do has been made in the operating department, the counselling specialist would then communicate the result.

Chanelling communications (complaints and enquiries) from the designated groups to the counselling specialists may have advantages in establishing personal rapport among the people concerned. It may also enable a counselling specialist to obtain a special understanding of the role and priorities of people in the designated groups.

This structure is, however, not without its difficulties. In particular the principle of equal justice, and the right of workers and of employers to select the representatives of their own choice, might both seem violated if the opportunities for access to the Board vary according to the choice of representative.

It seems to be on this ground that the 1973 Task Force criticized a similar structure.

> "It is not appropriate for the administrative assistant group (then performing functions similar to the present counselling specialists) or Board members to deal with high level complaints or for the Manager of Public Service and Information to spend a large amount of his time dealing with the continuous queries received from Toronto Star's Star Probe. All complaints should be channelled through the appropriate Counsellor to the appropriate area of the organization."[18]

18 The Administration of Workmen's Compensation in Ontario, 1973 Task Force Report, at p. 15.

With regard to M.P.P.'s in particular, another difficulty is that this structure might be a negative influence on their efficiency in the process of legislative reform. It might be argued that, for the discharge of their legislative responsibilities, M.P.P.'s can obtain the best perception of needs by first-hand exposure to the ordinary processing of the Board, rather than by having the problems with which they are personally concerned channelled in a special way for more senior attention.

In addition to the above role, the counselling specialists also prepare the replies to letters addressed to the Chairman, or to a Commissioner.

In this connection, as well as in dealing directly with enquiries from the outside, the counselling specialists provide information on general policy issues, as well as responding to enquiries on particular claims.

The counselling specialists also act on behalf of the Board as speakers at outside events.

f) Interview Settings

The design of physical plant for interviews is, of course, particularly important when people are coming, sometimes at a time of distress, to discuss problems of personal importance, and sometimes sensitivity.

At the Board, basic enquiries are answered across a counter or beside a reception desk; but interviews of greater depth are conducted in an area assigned for that purpose, or in offices.

At the head office, most interviews take place in an area assigned for that purpose on the 7th floor. There are divisions for privacy. But the area is very noisy in busy periods, and the dividers are too hard and smooth for accoustical control. The Board, however, has this matter in hand, and plans currently being implemented for the re-design of this area will include the padded type of sound absorbent divider, and more offices for privacy and quiet. Similar improvements may be needed, however, in local offices.[19]

19 For example, in a counselling interview that I observed at a local office of the Board, the discussion took place over the noise of two typewriters. This did not seem to bother the particular worker. But I felt that others might find it distracting.

4. The Claims Adjudication Manual

> "... the Workers' Compensation Act is not a complete code. It does not, nor could it, provide all the rules needed to make a workable system. The Act is skeleton legislation. It contains the basic principles and the primary rules of the system. But it leaves the Board to fill the gaps, to flesh out the detail, to provide the subsidiary rules within and about the framework established by the Act. Thus the responsibilities of the Board include not only the interpretation of the Act but also the issuance of rules, regulations, orders and directives for its due administration and for carrying out its provisions."[20]

In some of the larger compensation boards, the various rules and directives that have been issued by the Board to its staff for the adjudication and administration of claims have been gathered in a Claims Adjudication Manual, and that is the position in Ontario. With a total of about 230 adjudicators making initial decisions, plus other staff considering claims in supervisory roles, as claims counsellors, and in the appeal system, it could be no other way.

Each adjudicator has a copy of the Manual, and copies are available to claims counsellors and others who may need to refer to them.

The Manual is in looseleaf form. It serves both as an instrument for the initial training of adjudicators and as a working tool. The Manual is sometimes referred to inside and outside the board as containing "board policy". But that may be a misnomer. The Manual contains not

20 "Decision No. 134", (1975) 2 Workers' Compensation Reporter 137, 138 (B.C.).

statements of aspiration or objectives, but statements in the form of rules; i.e., criteria for decision.

The Manual is treated as a secret document. It is not available to anyone outside the Board.

To overcome the lack of published rules, suggestions have been made from time to time that public access to the adjudicative criteria and procedures of the Board could be improved by publishing more regulations.[21] The regulation-making powers of the Board are extensive, but very little used. The suggestion of putting adjudicative criteria into regulations is, however, not really viable.

To the extent that any recommendation for more regulations was adopted, it might mean that the rule-making process became subject to a greater involvement of lawyers whose background orientation may lie in private law, or in other areas of public law, rather than in workers' compensation.

The main concern, however, is that the regulation-making process is too cumbersome for use as a normal routine. When the Board does initiate the promulgation of regulations, the procedure is as follows:

21 See, e.g., The Administration of Workmen's Compensation in Ontario, Task Force Report, 1973, pp. 12 and 35.

a) The regulations are drafted within the Board. This will require inter-action between legal and policy-making personnel.

b) The draft regulations must be submitted to the Registrar of Regulations for approval. This is, at least in theory, for a review of form, grammar, jurisdiction, and compatibility with the Act.

c) Submission of the regulations to the Minister.

d) Presentation to the Cabinet.

e) Review by the all-party Committee on Regulations.

f) Final approval by the Cabinet.

Because the Board is the adjudicating tribunal as well as the rule-making body, it is not dependent upon the courts for the enforcement of most of its rules. Hence it has no need of its own for the formal promulgation of its rules through the regulation-making process.

Thus the danger of any requirement that the Board should promulgate its adjudicative criteria and procedures as regulations is that compliance would, at best, only be partial. Inevitably, the use of less formal directives would still prevail. Moreover, there might be confusion within the Board (because adjudicators would have to work with the regulations and with the less formal directives), and increased

confusion outside the Board because the public availability of adjudicative criteria would be largely illusory.

A more viable alternative would be simply to require publication of the Claims Adjudication Manual. This is the position that I have advocated for many years,[22] and that I adopted in British Columbia.[23]

The main argument for publication is that, however labelled, the Claims Adjudication Manual is essentially a body of law. It is a system of rules generated by people in positions of public authority and used in the adjudication of claims, i.e., for the decision of people's rights and obligations under a provincial statute.

Objections to the secrecy of the Manual have been itemized elsewhere.

> "The objections to secret law are, of course, profound. First, it can be difficult for the people interested in a pending decision to submit evidence or argument if they cannot check what is relevant because the applicable criteria are not published. Secondly, any right of appeal that might be provided can be difficult to use if people cannot check whether established criteria have been followed. Thirdly, reform through the democratic process is impeded if those who might advocate or discuss reform are not allowed to inform themselves of what is and why. Fourthly, if rules of a quasi-legislative nature are not published, any violation of a statute law is concealed, and there is no check through publicity on the legality of the

22 E.g. in "Contemporary Developments and Reform in Personal Injury Compensation", Special Lectures of the Law Society of Upper Canada, 1973, 521, 547 et seq.

23 The preface to the Claims Adjudication Manual of British Columbia, which explains the reasons for its existence, is annexed to this report as Appendix A.

> rules. Fifthly, the absence of published criteria can facilitate arbitrariness, or the infiltration of improper criteria. Sixthly, the failure to publish manuals and directives is often co-extensive with a failure to give reasons for decisions. Together, these failures negate the value of publicity for quality control in public appointments."[24]

The objections to secret law are deep-seated in the history of civilization, and do not lie only in its incompatibility with democratic ideals. Even in authoritarian and ancient regimes, the publication of written law has been deemed essential to prevent arbitrariness. Indeed, this was among the issues that appears to have led in about 494 B.C. to the First Secession of the Plebs and the subsequent compilation of the Twelve Tables.[25]

Again, "Secrecy breeds suspicion, and suspicion undermines confidence."[26] Any adjudicating tribunal that reaches its conclusions partly by reference to invisible principles creates for itself the risk of appearing to make unprincipled decisions.

24 "The Intrusion of Private Law in Public Administration", T.G. Ison, (1976) 17 Cahiers de Droit 799, 806.

25 "Obviously the law had not only been administered by patrician magistrates but had been unknown in a large measure to the general public. The plebeians wanted a code, so that, if a plebeian were wronged by a patrician magistrate, he could point definitely to the provision in the code which the magistrate had broken." Historical Introduction to Roman Law, 1932, H.F. Jolowicz, Cambridge U.P., p. 12.

26 "Decision No. 1", 1 Workers' Compensation Reporter 1, 4.

This problem of secret law cannot be overcome simply by giving reasons for decision in each case. So long as the Manual is treated as secret, references to the Manual are not included in reasons for decision, and the parties concerned cannot, therefore, be shown that a decision has been reached according to rules of general application, rather than as an intuitive reaction to the particular case. Reasons for decision cannot be complete and unrestrained if the criteria used in making a decision are not available to the public.

The secrecy of the Manual might be a cause not only of unnecessary suspicion, but also of erroneous speculation. For example, it has been rumoured that the Board has a rule to the effect that a supplement awarded under S. 42(5) will be terminated automatically after 18 months. Some people continue to suspect the existence of such a rule,[27] notwithstanding that the Board has denied its existence. It would surely inspire more confidence if the public could see for itself what the rules are.

Again, people outside the Board, particularly those in organizations that advise workers and employers, do not know how to react when an adjudicator decides according to a principle that differs from their previous experience. They do not know whether it reflects a deviation (and therefore perhaps a good ground for appeal) or a change in Board

27 This appeared from interviews conducted for the preparation of this report.

rules.

Those outside the Board who advise workers and employers labour under a significant handicap by not having available to them the same reference material as the claims adjudicators. Not only would the Manual be useful to them for reference, but also for the training of new advisers. Similarly in the law faculties, when they deal with workmen's compensation, materials from other jurisdictions must be used to a greater extent than is desirable because the rules and decisions of the Board in Ontario are not available.

Publication of the Manual might also have some collateral advantages within the Board. One would be to provide an additional mechanism for quality control. If any adjudicators or intermediate levels of management should inject uniquely personal interpretations of the Act, or otherwise deviate inadvertently from the Manual, this may become noticeable to representatives outside the Board, and therefore come to light and be corrected more quickly than might otherwise be the case.

Secondly, publication of the Manual might help to avoid the use of house jargon in its composition. This in turn could help to promote the use of ordinary English, rather than house jargon, in the training of adjudicators, and in other internal communications. When house jargon proliferates, it tends to find its way into the external communications of an organization. Publication of the Manual might, therefore, help to maintain the use of ordinary English in decision letters and other external communications.

Thirdly, publication might help to make the Manual a comprehensive volume, rather than run the risk of some Board rules being disseminated through, for example, news releases or pamphlets, but not otherwise being recorded in a readily accessible and indexed form.

Publication of adjudicative manuals has also been the subject of discussion in relation to other administrative tribunals. For example, in discussing the Parole Board, a study for the Law Reform Commission of Canada concluded that:

> "Policies can be found in rules, regulations, memoranda, directives, minutes of Board meetings, the Parole Services Procedures Manual, the Board's Procedures Manual, the Board's annual reports, its members' public statements, its own press releases as well as those issued by the Ministry of the Solicitor General. Apart from problems in amassing all Board policies, we had difficulty in understanding why some policies appeared in one of these sorts of documents, while others of a similar or related nature did not.
>
> We discovered that the Board had no index for its policy memoranda and directives. It did, however, maintain an index to minutes of Board meetings at which, presumably, its policies are adopted. But not all policies are disseminated by Board memoranda or directive. And in fact, it might be difficult for the Board to know for certain all of the ways in which a particular policy was disseminated.
>
> Many of the Board's policy memoranda and directives contain information that is crucial to an accurate understanding of the parole process. Yet these are not considered to be public documents, and are not usually made available to either inmates or the general public."[28]

If applied to the Workmen's Compensation Board, that statement would

28 The Parole Process, Administrative Law Series, 1976, Law Reform Commission of Canada, p. 145.

not be correct in every detail. But the picture is similar.

The Law Reform Commission concluded that:

> "Whatever system is used, we believe the Board's general policies, like its rules and regulations, should be public information. To the inmate applying for parole, there is little between the application of a policy rather than a rule. For society, its understanding of the parole process, is not enhanced by the Board using policies in a manner that hides them from continuing public scrutiny."[29]

The same point has been raised in the past in relation to the Unemployment Insurance Commission. That Commission still does not publish all of its manuals, and some of those that are not published, for example "MANUIC 4", include adjudicative criteria as well as housekeeping instructions. But U.I.C. does now publish its Digest of Benefit Entitlement Principles, which is the main reference volume containing its adjudicative criteria. That is a looseleaf publication with an amendment service. Decisions of the Umpire (the final level of appeal) are also published.[30]

From organizations represening workers and employers, requests for publication of the Claims Adjudication Manual have been made in the past. For example, the Canadian Manufacturers' Association (Ontario

29 Ibid p. 146.

30 For a discussion of the preparation and publication of U.I.C. manuals, and possible improvements to their present structure, see Unemployment Insurance Benefits, by P. Issalys and G. Watkins, 1977, Law Reform Commission of Canada.

Division) has written that:

> "5 Our second point is that employers and compensation claimants should know how the Board exercises discretion. Board policies should be published in a policy manual that is available to the public or, when appropriate, as Regulations under the Workmen's Compensation Act.
>
> 6 That there are so few Regulations under the present Act and no published Board policy directives relative to claims processing leads to inequities. This is evident with respect to employer interests and, we suggest, claimants too are unevenly served.
>
> 7 In short, the rules should be clear and available to all."[31]

Of the representatives of workers and employers interviewed in preparation for this report, all felt that the Manual should be published, though they differed in the priority that they would attach to this. To some, it was obviously a matter of vital concern, and was mentioned in response to a general question. For example;

> Q: "Is there any information you think you should be getting from the Board that you are not receiving?"
>
> A: "If we had Board policy we would know how to plan an appeal".[32]

To some other representatives, other issues not relevant to the work of this Commission (such as the level of benefits, delay, or the recovery of overpayments) appeared to have a higher priority, and publication of the Manual was not mentioned until I asked whether they

31 Submission by the Canadian Manufacturers' Association (Ontario Division) on Workmen's Compensation to the Minister of Labour, 1977, p. 25.

32 Interview with Pat McCoy of the Injured Workers' Consultants, May 1978.

thought it should be published.

It is hard to find reasons for not publishing the Claims Adjudication Manual, and I have never found any that would stand serious reflection. To the reasons that have been mentioned in casual discussion over the years, there are obvious answers.

The Manual couldn't be published in hard cover because parts are always changing.

(Publish in looseleaf form and issue replacement pages, the same as for internal use).

It would be difficult to know who to send replacement pages to when rules are changed, or new information or new rules become available.

(Maintain a subscription list. It would be much easier to know who has copies of the Manual than to know who has copies of the pamphlets, speeches, and other material that the Board distributes at the moment).

If the Manual was made freely available to anyone the cost would be prohibitive.

(Make a charge to cover the production

and distribution costs).

If a charge was made for publication, that would discriminate against the majority of workers, who could not afford to buy it.

(That comment could be made about almost any publication. It hardly seems a reason for not making copies available for the public to read at each office of the Board, and at public libraries).

Some people outside the Board would not have the background knowledge to understand the Manual, or to use it effectively.

(If people are uninformed about the Board rules and procedures, that hardly seems a reason for preventing them from becoming better informed. The argument that some people will not understand it would be equally applicable to any body of law).

The Board cannot be bound by fixed rules. The Manual contains rules of normal practice. But the Board cannot be bound by them. It must reserve a discretion, within the scope

of the Act, to deviate from normal practice when special circumstances warrant some departure.

(That is normal in many other bodies of law. Many statutes, for example, establish rules coupled with a discretion in a minister, a judge, or some other official to depart from those rules and come to some other conclusion in special circumstances).

Indeed, the objections to publication that have been raised in the past would be equally applicable to the Statutes of Ontario.

One point sometimes discussed is whether publication of the Manual might aggravate existing conflicts. As the proceedings and subsequent history of the Meredith Report[33] showed, the Board was conceived and born in strife between labour and management. In the subsequent positions of labour and management in relation to workmen's compensation, there have always been large areas of consensus, and there have been substantial areas of conflict. There might be some fear that publication of the rules would fuel further conflict of an acrimonious nature about what the rules should be. It is difficult to

33 Final Report on Laws Relating to the Liability of Employers, W. R. Meredith, 1913, Ontario.

see, however, how conflict between labour and management would be aggravated by both groups being allowed to obtain a more accurate knowledge of the system. Indeed, it may well help to reduce suspicion and surmize. Moreover, the dialogue of conflict could well be more constructive if all concerned are better informed. Also the risk of distortion of the Board's position is surely enhanced more by secrecy than by disclosure.

Related to this, there may be some concern that publication could result in time-consuming demands from people perceived as political opponents. Any institution of government must operate within a range of constraints resulting from the incidence of political power. For officials of a department or agency to engage in critical debate with people who have no sympathy for those constraints, or who may themselves be functioning under a different set of political pressures, might be perceived as a debilitating exercise; a waste of time, and not a constructive exercise aimed at improvement. But involvement in political controversy is not something that the Board has escaped, and again, it is difficult to see how any negative aspects of this could be aggravated by allowing political opponents to become better informed. Indeed, this too may be an area in which publication of the Manual may help to curtail rather than expand any waste of time. Publication of the Manual could mean less need of Board resources to correct any false impressions of what the rules and practices of the Board are.

Another concern, and again one that has been found in workmen's compensation since the early days, is that there should be no return to

the adversary system. The use of lawyers by workers and employers, though permitted, ought not to be encouraged. Whatever value lawyers can bring in the presentation of evidence and argument might be seen as outweighed by the worst features of the adversary system; i.e. nit-picking over technicalities rather than focusing on the real merits of the case, delay, adjournments, higher administrative costs, and loss of a sense of purpose. Moreover, the goals of the legal profession, when acting for workers, may be seen as conflicting with the goals of the Board. The primary goals of the Board (which may well be shared by the majority of injured workers) are the maximum clinical recovery of a worker, and rehabilitation. The legal profession might be perceived as lacking a capacity to support these objectives, and therefore undermining them by focusing instead on the maximization of compensation benefits.

With regard to these points, however, it is difficult to see how publication of the Manual could make any difference. The judicial review of Board decisions is almost entirely precluded. The Board does not pay legal fees to the advocates of parties, and the compensation benefits in all serious cases take the form of a pension rather than a lump sum. As long as these conditions obtain, there is little likelihood of any substantial increase in the numbers of lawyers acting for workers. With regard to employers, it is again cost factors that influence the use of lawyers rather than the availability of adjudicative criteria.

Some types of information which one might expect to find in a Claims

Adjudication Manual are now being published by the Board in other forms. For example, the Board is preparing a pamphlet listing the industrial diseases accepted by the Board as compensable; and this list will include the diagnostic and exposure guidelines used in claims adjudication. This pamphlet should be particularly useful for doctors who need this information and do not need other adjudicative criteria. But it is not the most useful form of publication for those who want all adjudicative criteria. A collection of pamphlets contains no comprehensive index. Nor are pamphlets so readily shelved for future reference as a looseleaf manual. Moreover the circulation of pamphlets is not associated with a mailing list for replacement pages. It would surely be more helpful if this type of information was produced, or reproduced, in a revised and published Claims Adjudication Manual.

In response to a specific request, the Board will now supply a statement of its position with regard to any particular topic in the Manual. But again, it is difficult to understand why the Board should be willing to supply someone with statements of its positions in the Manual if requests are received one at a time, but not willing to allow the same enquirer to read for himself the position of the Board on all topics at once. This practice of responding to requests, and thus allowing screened or discretionary access to adjudicative criteria, rather than disclosing the whole volume, is one that has long been criticised in other contexts. The applicant for access to the rules is cast in the role of a suppliant for the exercise of a discretion, with a consequential risk that the response to enquiries may operate to regulate critical commentary. Feelings of gratitude for information

already received, or fear of the curtailment of future information, could tend to restrain the production of critical commentary by those who depend on information from the Board. Putting the argument in a more extreme form, discretionary access to information, and particularly discretionary access to adjudicative criteria, can be seen as a restraint on freedom of speech as well as a denial of due process. Concerns of this kind exercised the Committee on Administrative Procedure of the U.S. Attorney-General in stating that:

> "Where necessary information must be secured through oral discussion or enquiry, it is natural that parties should complain of a 'government of men'. Where public regulation is not adequately expressed in rules, complaints regarding 'unrestrained delegation of legislative authority' are aggravated. Where the process of decision is not clearly outlined, charges of 'star chamber proceedings' may be anticipated."[34]

The Committee felt that for an adjudicating tribunal simply to respond to enquiries about its adjudicative criteria is not enough.

> "As soon as the 'policies' of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form."[35]

My impression is that the reason for the secrecy of the Manual is simply a lack of perceived need for publication, or perhaps rather

34 Report of the Committee on Administrative Procedure to the Attorney-General of the United States, 77th Congress 1st Session, Senate Document No. 8, 1941, p. 25.

35 Ibid, p. 27.

that the perceived need is not assigned a high enough priority to warrant the resources required for publication. It is perhaps natural in any government department or agency that, unless there are legislated requirements, the priorities that determine the production and distribution of documents will tend to reflect internal needs rather than outside needs, or meditation on issues of constitutional principle. Also, in so far as the argument for publication rests on basic principles of democratic government, it is unrealistic to expect these to be a source of constant reference by harrassed administrators who function under daily pressures to meet more prosaic and more urgent demands.

There is no doubt that publication of the Manual would involve some extra work in its initial publication, and in its continuing revision. For example, more care would be required to avoid house jargon. Abbreviations may need to be replaced by sentences or phrases. Also when a manual is kept for internal use only, any inconsistencies can be resolved as they come to light, and before they have caused any confusion or embarrassment outside. With publication, more care might be needed to avoid inconsistencies, and to ensure that the wording of the Manual records what is meant.

It would be wrong, however, to count any additional allocation of resources as simply a cost of publication. The process of publication should help to make the Manual also a better document for internal use.

Another possible explanation for the secrecy of the Manual may be that

there is some ingrained reluctance in the public service to publish adjudicative criteria that has no rational basis. The anecdotal comment in Appendix B to this report may be of some interest on this.

The position of the Board with regard to publication of the Manual appears to have been gradually easing in recent years. Indeed, the most recent statements of the Board seem incompatible with its continuing secrecy. For example, the Chairman is reported to have said that:

> "The communications staff are looking at ways of making the Board's policies and operations more clearly understood by those who are affected by the compensation process."[36]

There is surely no more likely way of making the Board's policies more clearly understood than enabling interested people to read what those policies are.

36 "A Message from the Chairman", W.C.B. Report, Spring 1978, p. 2.

5. Claims Decisions

Claims decisions are communicated to the worker and the employer, but are not available to the public.

In the general run of non-controversial claims, there are no decision letters. The worker is informed that the claim has been allowed by receiving the first cheque, and the employer is informed by the payment appearing as an item on the monthly cost statement that he receives.

Although the first cheque informs a worker that his claim has been allowed, he may also like to know how the amount of compensation has been calculated. The introduction of computer technology for generating cheques has made it feasible to provide this information automatically. A statement is sent with each cheque indicating the type of award (e.g. temporary or permanent benefit), the period covered by the payment, and the wage rate being used on the claim as a basis of calculating compensation. The statement does not tell the worker what pre-accident period of earnings was used by the Board to establish the wage rate. This is because of a technical problem in the computer system that is now being resolved.

Apart from notifying the parties concerned and their representatives, claims decisions are treated as confidential to protect the privacy of the worker. From my discussions outside the Board, it appeared that this position is supported among labour and management representatives.

The outside groups most likely to be interested in claims decisions are those responsible for the administration of other payment systems that may involve over-lapping or duplicate benefits, such as U.I.C. and insurance companies. There are strong feelings in the labour movement that claims decisions should not be notified to other insurance or benefit organizations, whether government agencies or insurance companies. The current practice is that if the Board receives a written authorisation from the worker, it will inform an insurance company of the payment and time period, but not otherwise.

With a view to avoiding unwarranted duplications, some discussions took place a few years ago between U.I.C. and the provincial compensation boards. The possibility being discussed was that the computer tapes might be run together to identify any duplication of payments to the same claimant in respect of the same time period. But that never came to fruition.

When a claim is denied, a decision letter is sent to the worker. Similarly where the employer objects to a claim which is subsequently allowed, then unless the employer is satisfied with the telephone explanation, a decision letter is sent to the employer. The information that the Board communicates to the employer will include the diagnosis in general terms, but not the details of the diagnosis.

Sometimes a potential employer will make an enquiry at the Board about a potential employee, asking how many claims the worker has had. The Board regards that information as confidential and declines to answer.

To respond to enquiries of that type might place W.C.B. claimants at a disadvantage compared with those who have suffered previous disabilities of a non-compensable nature. Moreover, it would tend to undermine rehabilitation policies by encouraging employers to focus on disabilities rather than abilities.

From my discussions, it appeared that the Board position on this is supported among management and labour representatives. Union officials felt that disclosure of this information would be an invasion of privacy, and a management representative mentioned that it would be contrary to good rehabilitation policy.

Copies of appeal decisions are sent to the worker, the employer, the representatives of either, and any other people who have expressed a particular interest in the claim on behalf of the worker or employer such as M.P.P.'s. They are not made available to the press or the public. Nor are they supplied to someone whose interest in the case may be collateral. For example, if a union official who is not representing the particular worker asks for a copy of a decision because he has heard about the case and feels that it may have some precedent value to him, a copy will not be supplied.

6. Reasons for Decisions

The decision letters of the Board have always been a subject of complaint. One of the complaints has been, as it still is, that they fail to give reasons. In other respects, however, the decision letters seem to have improved in recent years. My impression from ones that I have seen is that they are more informative, more courteous, and more comprehensible than the decision letters I recall having seen ten years ago. But they still fall short of really giving the reasons for decision. As one workers' representative put it:

> "Initial letters and appeal decisions don't really give reasons. The inter-office memos give the reasons, not the decision letters."37

Other workers' representatives mentioned that they feel frustrated upon receiving a decision letter with the reasons consisting of nothing more than "medical evidence indicates that..." followed by a conclusion. A decision letter of that kind may leave the reader uninformed about the nature and extent of the medical enquiry, the clinical observations, the deductive reasoning in the medical conclusion, and the evidentiary criteria being applied.

It might help to include a sample of a contemporary decision letter. The only omissions relate to the identity of people concerned, and the place of employment.

37 Interview with Pat McCoy of the Injured Workers' Consultants, May 1978.

Dear Mr. ...,

This claim was instituted in your name when we received a medical report from Dr. ... indicating that he treated you on ... 1978 for a chest disability. When the required reports were then assembled from yourself, and from your employer, this confirmed that on the date in question while performing your duties as a labourer, and specifically assisting a fellow employee lifting a ..., you became aware of a severe pain in your right side of your chest.

Additional enquiries were carried out with regard to the type of work which you were performing, as it was noted that you had been transferred to the ... area on ... 1978. Your employer has now submitted further information which would indicate that prior to this transfer, you were performing a heavier type of job when you were assigned in the ... room. Your condition was diagnosed as a spontaneous pneumothorax.

Your claim has also been reviewed by our Medical Branch, who have advised that the condition which was diagnosed in your case, is quite a common occurrence in young men. Also, that this condition can result at any time without a precipitating incident being involved.

The Review Branch has carefully considered all of the circumstances involved here, and for the reasons outlined above, deny your claim for compensation and medical benefits, as it has not been shown that the disability arose out of the employment.

The above decision is open to appeal and information on the appeals procedure may be found in the attached pamphlet.

A copy of this letter is being forwarded to (the employer).

Yours very truly,

...

Claims Review Branch.

The letter is informative. It contains a statement of the background facts and the events that the Board accepts. It states the decision, and it includes advice on rights of appeal. But it still falls short of stating the real grounds of the decision. There are missing links in

the chain of logic from premises to conclusion.

What is the significance of the comment that the disability "is quite a common occurrence in young men". Whether a disability is compensable or not does not depend upon whether it is common or rare. Exactly what is the significance of the statement that "this condition can result at any time without a precipitating incident being involved". A statement of how such disabilities can result is of no significance to the reader unless the letter indicates what contribution that makes to the decision of the Board about how the disability did result in the particular worker.

The decision could have been reached on any of the following grounds, or others, and the letter leaves the reader to speculate which.

a) The lifting had no causative significance in the onset of the disability, but simply stimulated a symptom of an already existing disability.

b) Where a disability is of a type that can result from natural causes without any precipitation incident, the disability is not compensable regardless of whether, in the particular case, it did result from a precipitating incident.

c) If the disability had been caused by exertion, one would expect it to have occurred prior to the transfer when the worker was engaged in heavier work. That it occurred at a time of lesser exertion suggests that it was not caused by exertion at work at all, but simply by the development of natural causes.

Without knowing exactly the reasons for the decision, it can be difficult for a representative to advise whether there are grounds of appeal.

The Board will, of course, try to provide a further explanation of a decision in response to any subsequent request. But the requirement of reasons for decisions cannot properly be met in that way. Indeed, that overlooks the purposes of requiring reasons for decision. One objective is, obviously, to inform the recipients. But a paramount and far more important objective is to ensure that conclusions are reached by a process of logical reasoning. That objective is not achieved if reasons for decision are only produced subsequently in response to a request.

The Board does not publish any of its reasons for decisions. The majority of decisions, even at the final level of appeal, depend on conclusions of fact (including issues of medicine), and their publication would probably not serve any useful purpose. But it could well be useful to publish those decisions at the final level of appeal which would appear to have some guidance value as precedents.

The W.C.B. in British Columbia publishes a series of its reasons for decisions. The first of these, which explains the reasons for the publication, is reproduced as Appendix C to this report. The privacy of the worker is protected by excluding from publication his name and any identifying factors. The reasons for decision in appealed cases are also published under the Unemployment Insurance Act, under the Canada Pension Plan, and under workers' compensation systems in other countries.

7. Worker Access to Claims Files

a) The Files

Each claim for compensation is assigned a claim number and a file. The file is divided into sections. The first section contains the initial reports, subsequent reports (including medical progress reports and consultant's letters), and the payment sheet. Then there is a correspondence section, and finally a memo section. Medical information is arranged in these sections, and together with other material in chronological order.

A claims file will contain a variety of material. But in the discussion of access to files, it is usually on the medical reports that the discussion centres.

Some of the medical reports on a claims file come from the general practitioner attending the worker, some come from consultants to whom the worker has been referred by the general practitioner, and some come from company doctors. Some of the medical opinions on a file may have been generated within the Board, and these will generally take the form of memos from Board doctors, or report letters from outside consultants to whom workers have been referred by the Board.

b) Worker Access to a Claims File

Each claims file is treated as a confidential record. Subject to some exceptions (the main ones are mentioned below) no right of access to the documents on a claims file is recognized either for the public, or for people with a special interest in the particular claim. After a claims decision has been made, however, there are provisions for access to the documents in a file for the purpose of advancing or opposing an appeal.

In preparation for an appeal, an Appeals Administrator prepares a summary of the information on file for the assistance of the Appeals Adjudicator, or the Appeal Board, as the case may be. That summary is made available to the parties. The summaries are prepared with a wide left-hand margin. In the copies used by the Board, the names of the doctors, or of others supplying information, are stated. Those names are omitted in the copies supplied to the parties. Usually a summary is prepared after the commencement of an appeal. But a summary will be supplied, if requested, for the purpose of considering an appeal. The summaries that I have seen contain about three to eight pages of information organized under the headings ISSUE, DIAGNOSIS, HISTORY, and BENEFITS.

Among those to whom I spoke outside the Board, all felt that the summaries are helpful, and most seemed to feel that they are now well done. There was mention of the summaries being poor during some periods in the past, and a feeling among union officials that up to about a year

ago, the summaries were slanted in an argumentative form against the worker. They felt, however, that this has been corrected, and that the summaries are now a straightforward catalogue of information. I did not hear any specific suggestions for their further improvement.

After an appeal date has been set, the Board recognizes certain rights of access to a claims file for the purpose of checking the accuracy and completeness of the summary, or gathering further information. A worker is not allowed access to his own file. Nor are all representatives allowed access.

The categories of representatives allowed to see a claims file at this stage are:

1) Lawyers.

2) Articling law students, and any law student in a legal aid group or storefront office.

3) Lay representatives that assist workers, such as the Injured Workers' Consultants, but not representatives in all such groups. The criterion is that the representative must be at arms length, i.e., a regular representative of disabled workers whose role in relation to them is to act as their representative in communicating with the Board. Access is not allowed to any group of disabled workers who wish to represent each other.

4) A full-time union official, or another union official who is not in the same bargaining unit as the claimant, is allowed access. But a union official who is a fellow employee in the same bargaining unit as the claimant is not allowed access.

5) Members of the Legislature and their assistants.

6) Members of Parliament.

Except for lawyers and law students, representatives of a worker seeking access to the file must sign an undertaking in the following terms:

> "I hereby request to see the reports on the Workmen's Compensation Board claim file of M..... as I will be acting as his representative on his compensation appeal.
>
> I will undertake not to divulge to M..... any information in the medical records, without his doctor's permission, that might adversely affect his physical or mental health.
>
> I will undertake not to use such medical or other information publicly or for any other purpose except for his Workmen's Compensation Board appeal."

To obtain access to a claims file, lawyers go to the Legal Department of the Board. Other representatives go to the Appeals Branch. A representative is allowed to sit down with the file, to make notes, and to dictate into a tape recorder. But he is not allowed to make xerox copies of any documents from the file.

Before allowing a representative of a worker to see a file, the Board requires a written authorization signed by the worker, unless the

representative is an M.P.P. or assistant, or the authority of the representative is clear from prior correspondence.

This opportunity for a representative to review the file used to be limited to Toronto. But as from December 1977, arrangements can be made for a representative to review duplicates of the file documents at a local office of the Board.

Worker representatives with legal or para-legal training seem more prone to review claims files in preparation for appeals than union officials. One explanation may be that education in the law of evidence trains students to seek original documents, to be sceptical about copies, and not to rely on any paraphrase, summary, or secondhand report of a document. But another explanation is that there may be some misunderstanding. Union officials tend to use the claims counsellors, or the counselling specialists, more than seeking direct access to the claim file. The Board officials to whom I spoke understood that this was the preference of union officials, while the union officials to whom I spoke understood that this was the preference of the Board.

Although the union officials to whom I spoke would normally be eligible, under the rules of the Board, to review a claims file before an appeal, they seemed to understand that their opportunity for checking the information in a file was limited to a discussion with a counsellor. Indeed, one of the complaints was that "...We have to sit across the table while a Board official reads out the documents. We only see them

upside down."

Here again, there would surely be less risk of the Board position being misunderstood if it was stated in a reference work, such as the Claims Adjudication Manual, and made available to the public. The Board makes no secret of its position with regard to access to claims files. The position is explained in response to any enquiry, or may be found in speeches or periodical articles. But it is not communicated as part of a standard looseleaf reference volume available to the representatives of workers and employers.

Incidentally, one limitation of current practice is that a union official or other representative must elect between:

1) talking to a counsellor, at which time the file may be discussed, but the representative will not have free access to peruse the documents, or

2) seeking access to the file, in which case the representative will see the documents, but not have a contemporaneous opportunity for discussion.

From my discussions with union representatives, I was left with the impression that they may sometimes prefer a mixed procedure in which they could discuss the file, and at the same time look at the critical documents themselves.

The importance of seeing the file, rather than receiving an oral explanation of the file has been explained by one group of workers' representatives in the following terms:

> "Relating ... the contents of a file verbally by one person to another is ... not a very satisfactory way for a representative to fully understand and prepare a case. Rather, the representative should see the file for himself, to visualize the evidence before him, to judicially ponder and question for himself the information before him, at his own rate of comprehension. He should be able to flip back and forth over the material to link the delicate or complicated pieces of evidence together to mould and form the argument he shall require to put forward at the appeal hearing on his client's behalf."[38]

The importance of seeing the file, rather than relying entirely on the summary, was explained by another workers' representative as follows:

> "While a law student in Toronto, my experience was that the Board would permit me to view files after an appeal date had been set. During 1977, my experience was that I was able to see almost all of the material contained in the file. I found that I very often was able to appeal successfully solely on the basis of information contained in the file which was not apparent to me upon reading the Summary of Information supplied by the Board. In my opinion, it is absolutely necessary for a legal representative to review the file prior to an appeal, as the Summary of Information is at best a useful shorthand."[39]

The access of a worker or his representative to a claims file might be claimed as an aspect of procedural due process. On that ground, one would think that access should be allowed either in advance of the initial decision, or in preparation for an appeal. Worker access to a claims file might also have some advantage as an aid to quality control. Comments by Board staff of an impressionistic or judgmental nature,

38 Brief to the W.C.B. by the Industrial Accident Victims' Group of Toronto, 17th November 1977, p. 11.

39 Letter from R. Edwards of Thunder Bay to the writer, 2nd of June 1978.

which are a necessary part of Board operations and which are commonly noted on a claims file, might be more carefully worded, and might be more restricted to situations in which there is clear ground for them. Indeed, this reaction has become the deliberate policy of the Unemployment Insurance Commission in response to the recent amendments to Part 4 of the Human Rights Act of Canada. Thus in responding to these amendments, the Deputy Minister/Chairman of the Unemployment Insurance Commission announced:

> "All staff should become immediately sensitive to this new right of individuals to have access to personal information on their records. Comments and data put on client records should be relevant to our requirements, accurate and to the greatest extent possible, supportable. Judgmental observations are a necessary part of our work in all our programmes. However, such necessarily subjective comments should be carefully worded and only entered where they are directly relevant to the decision-making process."[40]

c) The Doctor-Patient Relationship

A traditional explanation of the refusal of the Board to allow a worker to see his claims file is that the organizations of the medical profession would object to this as an intrusion in the doctor-patient relationship. A patient is not allowed to see his file in a doctor's office. For the Board to allow a patient access to his medical records would, therefore, undermine the claimed right of a doctor to deny such access.

40 CUIC Privacy Handbook, 1978, Ch. 1, p. 2.

If a patient had a right, recognized by the medical as well as the legal profession, to see the records on his file in a doctor's office, the access of a worker to his file at the Board might follow, almost as night follows day.

A possible explanation of the reluctance of official organizations of the medical profession to recognize a right in a patient to see his medical records might be the strong oral tradition that has characterized the doctor-patient relationship. For a doctor to provide a patient with an opinion in writing seems to have the status of a taboo which is not explained simply by the greater convenience of oral communication.

A possible explanation of this phenomenon that occurs to me is historical, and might perhaps be illustrated by a comparison of the medical and legal professions. By the nineteenth century, the legal profession was still serving almost exclusively the prosperous and literate sections of the population. Its principal clients were accustomed to using documents, and it may be partly for this reason that the tradition emerged of providing opinions to clients sometimes orally or sometimes in writing.

The medical profession, however, seemed to serve a broader population much earlier than the legal profession, and a large proportion, perhaps the majority, of its patients were illiterate. Moreover, the provision of medical advice often requires a physical examination of the patient, which itself provides an opportunity for oral communication. There

is no parallel in the legal profession, and inter-action with clients by letter and telephone is often feasible.

These factors might, perhaps, explain why doctors developed the habit of providing opinions in writing to each other, to insurance companies and to other organizations, but not to patients. Perhaps it is possible that the habit became the tradition, and that the tradition became the conventional wisdom.

Another difference between the two professions lies in their perception of property rights in respect of documents produced in the course of acting for a client. Drawing analogies from the law relating to other professions, and from the law of agency, it would be consistent with general principles that at least some of the documents on the patient file of a physician would be the property of the client (usually the patient).[41] At the very least, it would be consistent with general legal principles that a patient-client should have a right of access. The medical profession has, however, generally succeeded in maintaining that medical reports are the property of the doctor producing them, the doctor receiving them, or the hospital[42] or some other institution.

41 Indeed, it has even been argued within the legal profession that medical records on the file of a company doctor are the property of the company. See e.g., the Report of the Committee on Privacy, 1972, Cmnd. 5012, para. 375 (U.K.).

42 See the Public Hospitals Act, Revised Statutes of Ontario, 1970, Ch. 378, s. 11.

There is, however, contemporary debate within the medical profession as to whether a right of patient access should be recognized.[43]

The traditional argument for denying any patient right of access to his own medical records is, of course, that the perusal of medical documents by a patient may not always be in his own best interests. But it is difficult to see why, in protecting the patient's interests in this area, the profession should claim a right of ultimate decision.

One would think, for example, that an unfortunate choice by a patient with regard to treatment could be more disastrous than an unfortunate choice regarding access to records. Yet the profession makes no similar claim to a right of ultimate decision. When the question is, for example, whether a patient should have an operation, the patient seeks advice from the doctor, but both recognize the ultimate right of the patient to decide for himself. Why should the same principle not apply to access to medical records? A possible answer is that the doctor, having seen the file, is in a better position to assess its likely impact on the patient. But the same is true with operations. Yet the superior knowledge and superior ability of the doctor to predict the likely consequences are not used as arguments to deny a patient's right to decide for himself. It is difficult to see why they

43 For an excellent discussion of the legal position on this, see the Brief of the County of York Bar Association to the Royal Commission of Inquiry Into the Confidentiality of Health Records in Ontario, 1978.

should be used to deny that right when the question at issue is access to file documents.

A possible explanation of the reluctance in the medical profession to disclose to a patient his own medical records might be that this could tend to undermine the scientific image of the profession. The public might have greater exposure to the limits of medicine as a science, and greater recogniztion of the speculation and value judgments that often lie behind a medical opinion. Controversy or differences of opinion among doctors might be more exposed to public view, with a possible fear that the confidence of patients in the profession might be undermined.

Moreover, the exposure of patients to visible differences of medical opinion might create a pressure on doctors to explain their positions more fully, and this may be a role that some doctors may feel they should not be expected to undertake.

> "As long as the oldest of us can remember, the doctor has not only been held in high respect but has appeared to dwell apart on Olympus, making pronouncements rarely and even more rarely descending to public discussion. The discipline of their training makes doctors reticent to enter the give and take of public debate. This, however, is changing."[44]

Another perception is that refusing patient access to medical records

44 Report of the Special Study regarding the Medical Profession in Ontario, E. A. Pickering, 1973, Ontario Medical Association, p. 49.

helps to maintain the mystification required to preserve the socio-economic status and political power of the medical profession.

> "(The patient's) sickness is taken from him and turned into the raw material for an institutional enterprise. His condition is interpreted according to a set of abstract rules in a language he cannot understand. He is taught about alien entities that the doctor combats, but only just as much as the doctor considers necessary to gain the patient's co-operation. Language is taken over by the doctors: the sick person is deprived of meaningful words for his anguish, which is thus further increased by linguistic mystification.
>
> ...The university-trained and the bureaucrat thus become their doctor's colleague in the treatment he dispenses, while the worker is put in his place as a subject who does not speak the language of his master.
>
> As soon as medical effectiveness is assessed in ordinary language, it immediately appears that most effective diagnosis and treatment do not go beyond the understanding that any laymen can develop."45

Another explanation might be that medical records are not kept in a form that makes them readily comprehensible on a layman's inspection. They often include, for example, barely legible abbreviations of scientific terms. If a patient asks to see the documents on his file at a doctor's office, it might instill in the doctor the same kind of apprehensions as in a housewife who finds visitors on her doorstep before she has had a chance to tidy up.

There are, however, cogent reasons why a property right of a patient in his medical records should be recognized, or at least a right of access and copying should be recognized. One is the traditional legal argument

45 Limits to Medicine, I. Illich, 1976, Marion Boyars, p. 170.

that a doctor is not a businessman engaged in trade, but a professional person acting for a client, and, the advent of O.H.I.P. notwithstanding, the patient of a treating physician is still normally the client. The production of records is one of the things that, directly or indirectly, the client is paying for, and part of the service to which he is entitled.

Moreover, it might be argued that the interest to be protected here is more subtle and more profound than the interests normally protected by the legal system. The personal medical file about an individual might be seen and felt as part of the person's identity, an extension of personality. Thus the detention of it by a doctor and the denial of access might be seen and felt to go beyond the infringement of a property right to being a confiscation of self. In other words, it might be seen and felt as a psychological wrong analogous to false imprisonment.

Indeed, this may help to explain the image of arrogance that has been reported in relation to the medical profession:

> "Some (doctors) overawe with a manner that seems overbearing or sometimes even arrogant, assuming an attitude described by a woman appearing at one of the Public Hearings as "I God; you moron"... A widely voiced complaint is that some doctors appear to think that the patient has no right to know the facts about his condition."46

46 Report of the Special Study regarding the Medical Profession in Ontario, E.A. Pickering, 1973, Ontario Medical Association, p. 51.

It would surely help to overcome any image of arrogance if the profession recognized the right of a patient to see the file relating to himself, even if, as a practical matter, that right was seldom exercised.

Another argument for disclosure is that the concealment of medical records from patients may tend to foster a kind of intellectual incest in the profession that shields the goals and values of the profession from the risk of abrasive comparison with the goals and values of patients.

There are, however, indications that the idea of patient access to medical records is gaining acceptance within the profession, and opinions can be found that:

> "...the medical profession should develop a mechanism whereby the medical records of a patient can easily be made available to the patient".47

It has been argued not only that a patient should have a right of access to medical records relating to himself, but that copies of medical records should be supplied to the patient automatically. The suggestion is not only that this would improve patient confidence and understanding in relation to his condition and the profession, but that it would also have a positive influence on the speed and accuracy of

47 "Patient Access to Medical Records", W. G. McClure, (1977) 19 B.C. Medical Journal 457.

diagnosis, the avoidance of error, and the quality of treatment.[48]

d) Worker Access to Medical Reports at the Board

The right of a worker to see or obtain copies of the medical reports on his file at the board does not depend upon having a concurrent right of access to the documents on the file of his attending physician. But it the latter right was recognized, the former would more readily fall into place. Indeed, the traditional position of the Board has, to a large extent, been an act of deference to positions expressed by organizations of the medical profession.

An argument sometimes advanced against the disclosure of medical records by the Board is that this would violate the confidentiality of the doctor-patient relationship. One could see the strength of that argument if the question being considered was the disclosure of documents to third parties who have not been authorized by the patient to receive them. But it is an incredible argument to raise against the disclosure to a patient of documents relating to himself.

Perhaps a more credible form of this argument is the proposition that workers and their representatives would be better advised to obtain

48 The full text of this argument is reproduced below in Appendix D.

medical information from the attending physician than from the Board. When the attending physician supplies information, he may not simply provide copies of documents, but may also explain them in a way that makes them better understood. This may assist the accuracy of the patient's understanding, and may also help to avoid any undue anxieties.

A difficulty with this argument, however, is that workers and their representatives commonly find that they are unable to obtain copies of medical records from the attending physician. Some doctors will and do supply copies of medical reports to workers and their representatives. But the replies from others are reported[49] to include:

a) I have already sent my reports to the Board. Get what you want from them.

b) I will send you the report that you want. But my fee for this will be $50.00.

c) I don't send medical information to union officials.

Moreover, when the purpose of seeking access to medical records is to make representations to the Board, the medical records on the file of an attending physician would not be sufficient. They would not show, for example, what medical reports the Board has received from a company doctor, or what medical opinions have been placed on the file from Board doctors.

49 By workers' representatives in discussions with the writer.

An argument against the disclosure of medical reports to workers or their representatives has been that disclosure would make the reports less frank.

> "If medical reports are not privileged, then family physicians are not going to put anything in their reports which they do not want their patients to know.
>
> ...
>
> Being human, he is not going to jeopardize his reputation with patients or the union active in his community by putting in his reports to the Board information which might be interpreted as prejudicial to workmen's claims even if it is information which he feels the Board requires to make a proper assessment of the claim."[50]

More recently the O.M.A. has written that:

> "Records once contained the most candid comments to enable the physician to recall, months or years later, the precise circumstances relating to a patient. The fear of such comments being read aloud in a court of law has caused many doctors to refrain from including in medical records statements which might be embarrassing under such circumstances, even though they may be extremely helpful in the care of the patient. The increasing exposure of patient records for legal and audit purposes not only dilutes the confidentiality but also can cause the quality of patient care to be jeopardized."[51]

While that comment might be seen as an argument against the further disclosure of medical records, it could alternatively, be seen as supporting the view that any damaging effect of disclosure has already

50 Brief of the Ontario Medical Association to the Royal Commission of Enquiry into the Workmen's Compensation Act, 1966, pp. 5 and 6.

51 Brief of the Ontario Medical Association to the Commission on Freedom of Information and Individual Privacy, 1977, p. 4.

been brought about through the system of tort liability, so that any further detriment from further disclosure by the W.C.B. would not be more than marginal.

In my discussions with doctors, I have heard both the view that medical reports are becoming less frank and the view that there has been no perceptible change over the years.

There are other views too that the loss of frankness argument is not very cogent.

> "Medical reports should be made available and Section 97(a) should be redrafted to give the protection to the authors of the reports that Mr. McRuer recommended against vexatious claims but that otherwise they should be made available to the affected parties.
>
> The argument that making medical reports available to those affected by them will be a constraint on frankness was made at the time when the law of Ontario was amended so as to make such reports evidence in trials in the law courts. The fears then expressed appear to have been without foundation. The experience of the courts and of lawyers and judges associated with claims for personal injuries in the courts appears to have been that there is no reduction of frankness or completeness in medical reports as a result of the amendment. Medical practitioners are not required to attend in person; the submission of written evidence is allowed."[52]

Again

> "...times are changing and I'd like to think that if the Board's policy became one of complete disclosure that rather than putting less information in reports, doctors would consider telling the patient more to increase his understanding of what is going on.

52 Report of the Task Force on the Administration of Workmen's Compensation in Ontario, 1973, p. 33.

...

> A change in the attitude toward disclosure may well promote greater communication between some patients and their doctors, and I'd consider this a useful development in Workmen's Compensation matters."[53]

If a decision should be made in favour of total disclosure of the whole file, any consequential reduction in the recording of judgmental comments might be thought a price worth paying to obtain the increase in the confidence of workers that might be expected to follow from a more total disclosure of the decision-making process to their observation.

It may be argued too that disclosure, or the prospect of disclosure, contributes to more accuracy and relevance in medical reports. For example, ten years ago it was not uncommon to find comments in medical reports indicating racial prejudice. But that seems to have disappeared in recent years. Again, disclosure of medical reports might encourage more accuracy and precision in diagnosis, and less use of vague, ambiguous, non-descriptive or insinuating phrases, such as "functional overlay".

Another apprehension has been that the disclosure of medical reports to workers or their representatives might result in demands for the

53 Paper by M. Starr at a panel discussion on the Secrecy or Disclosure of Medical Information at the Association of Workmen's Compensation Boards of Canada, 1974 Annual Conference, p. 6 - 7.

attendance of doctors at Board hearings for cross-examination.[54] However, medical reports have been accessible to the representatives of workers, and to lawyers representing employers, for some years now in Ontario, and it has not worked out that way.

Another concern has been that in a limited range of cases involving psychiatric reports, a representative having access to the reports may discuss them with the worker, or may discuss them at an appeal hearing in the presence of the worker. The way in which such reports are discussed can have therapeutic significance. The discussion may have a suggestive impact on the worker. In other words, the process of advocacy, intended to maximize compensation benefits by putting the worst light on the worker's condition, may actually bring about a worsening of that condition. This might be seen, however, as an argument for making an exception in a very limited number of cases rather than as an argument for a general rule of non-disclosure.

Apart from the arguments, it may be helpful to consider whether there are any other explanations for the practice of the Board in not making medical reports about a worker available to that worker.

One such explanation might be that the arguments against disclosure are easier to illustrate. For example, reference can be made to a

54 See e.g., "Decision No. 119", (1975) 2 Worker's Compensation Reporter 103, 106 (B.C.)

hypothetical case of terminal cancer in which the attending physician is convinced that the patient will be happier in his remaining months if he does not know. If the arguments in support of disclosure rest on general principles - the patient's right to know, procedural due process, or principles of democratic government - rather than being illustrated by specific examples, they may for that reason make less impression even though they apply to all cases while the illustrations used to oppose disclosure apply only to a few.

Similarly if a threat is made by a worker against a member of the staff of the Board, or a member of the medical profession, following the disclosure of documents, it may well be assumed that the disclosure resulted in the threat. But when a similar threat occurs without any disclosure of medical records, it is unlikely to be assumed that non-disclosure had causative significance.

Another factor may be that the disclosure of medical reports to workers, and the more extensive disclosure of those reports to workers' representatives, might tend to induce a shift in the role of Board doctors. The more medical reports can be excluded from becoming the material of advocacy, the easier it may be for Board doctors to maintain a role of adjudication. The more the medical opinions of Board doctors become grouped with medical opinions from elsewhere as part of the material for advocacy, the more Board doctors will tend to be cast in the role of expert witnesses rather than adjudicators.

Medical and other personnel in the compensation boards in Canada have

traditionally found it difficult to accept that adjudicators, not medically trained, should be entitled to prefer the opinion of an attending physician, or other outside doctor, to the opinion of a doctor on the staff of the Board. This may help to explain why the opposition of medical organizations to the disclosure of medical records by compensation boards has traditionally been supported by Board doctors. In more recent years, however, my impression is that this opposition is not as firm as it used to be, and that among Board doctors, as well as elsewhere, there is recognition of the potential advantages of allowing patient access to medical records.

The practice of the Board in not making medical records available to the worker concerned was supported by earlier Royal Commissions.[55] But more recent studies have favoured disclosure.[56]

In other provinces, the continuing refusal of compensation boards to make medical records available to the worker concerned or his representative is largely explicable as an act of acquiescence in the power and influence of the medical profession. Thus, for example, the Saskatchewan Task Force concluded that:

55 Report of the Royal Commission on the Workmen's Compensation Act, 1967, pp. 71-73.

56 Report of the Task Force on the Administration of Workmen's Compensation in Ontario, 1973, p. 34; Report of the Royal Commission Inquiry Into Civil Rights, Vol. 5, 1971, p. 2177-8.

> "While the point of view of the doctors is not necessarily the correct one, the Task Force does recognize that cooperation from the medical profession is necessary if the workmen's compensation system is to function adequately."[57]

This factor was also an influence when the matter was last considered in British Columbia.[58]

Thus the reluctance of the medical profession to recognize a patient's right of access to his own medical records has had a profound and negative impact on frankness between government and people.

57 Report of the Task Force on Workmen's Compensation in Saskatchewan, March 1973, p. 68.

58 "Decision No. 119", (1975) 2 Workers' Compensation Reporter 103. Although I wrote that decision, it was a compromise, and the conclusion did not coincide with my own views. In relation to its Medical Department, the paramount goal of the Board in British Columbia at that time was to terminate the functioning of doctors as adjudicators (in which role they decided questions of law and policy, as well as medicine), to encourage them into a more penetrating pursuit of medicine, and into the role of expert witnesses. Although the disclosure of medical records to the worker concerned would have assisted in that objective, it would have been impossible, as a practical matter, to expect the Medical Department to cope with both changes simultaneously. Another problem was that some of the Board doctors were discouraging treating doctors from providing medical reports to patients. To obtain a majority on the Board for the termination of that practice by Board doctors, I acquiesced in the continuation for the time being of the refusal of the Board to make claims files available to workers and their representatives. I also felt that the Board would be in a stronger position to make further provisions for disclosure when some of the contemporary thinking, which was then emerging in the medical profession in favour of disclosure, had more time to mature, when the Medical Department of the Board had become more fully adapted to the role of medical advice, and when freedom of information legislation came more to the forefront of public discussion.

The position of the Ontario Federation of Labour is that:

> "An injured worker's medical and accident reports submitted by doctors and employers to the Workmen's Compensation Board should be made available to the employee or his representative upon request of the injured worker".[59]

In contemporary debate, there are two primary grounds on which a worker's right of access to the claims file is sought.

1) Access by an individual to any file that is maintained upon him by any department or agency of government should be allowed as a matter of basic human rights; a recognition of an ordinary human desire to "know what they are saying about me"; a recognition that ultimate injustice, if not immediate injustice can occur if government records about an individual are not subject to scrutiny and the opportunity of correction. On this view, a government file about an individual might be seen as an extension of the self, a part of the personality to which the government is allowed access, but which it should not have to the exclusion of access by the individual. It is this broad human rights ground that is now adopted in the Human Rights Act of Canada.

2) Access should be allowed as part of procedural due process; part of the opportunity to scrutinize the material being

59 Resolution at the 21st Annual Convention of the Ontario Federation of Labour, 1977, Conference Proceedings, p. 68.

considered by an adjudicating tribunal, and to present evidence and argument.

There are other arguments too by which the right of access might be supported. One is that it could have an upgrading influence on the quality of medical reports if doctors know that they may become accessible to the patient, or a representative of the patient. Another possible advantage is that the awareness of doctors that patients may have other ways of obtaining access to medical records might stimulate attending physicians to be more frank with their patients.

There is another argument, however, which is of paramount importance in relation to workmen's compensation. Access to the medical reports is essential to discover the legal criteria by which a claim has been decided.[60] Indeed, the legal principles, including the evidentiary criteria, that have been applied in the decision of a claim may appear nowhere in the file except to the extent that they are implicit or expressly stated in the medical reports.

> "As workers' compensation was introduced in the Canadian provinces, there was perceived a paramount need to abandon the cumbersome procedures of the ordinary courts, and to have claims decided by a new administrative tribunal. But the courts did at least have an established system, however imperfect, for inter-connecting the disciplines of law and medicine. How these disciplines were to interact in the new administrative tribunal was not clearly defined in the legislation, and has not since been established by any consensus.

60 This point was not as clear to me when I wrote "Decision 119", supra fn. 58, as it subsequently became.

...

"The interaction of law and medicine in some matters is well recognized. For example, when a fetus should be regarded as a human being is recognized as a question involving law and theology as well as medicine. It is less well recognized that there can be any legal involvement in diagnosis and etiology.

"Consider a disease (asbestosis for example) that involves progression over several years, perhaps passing through the following stages:

1. introduction of a contaminant to the human body;

2. discovery by a routine laboratory test of the presence of the contaminant;

3. tissue damage, but no symptoms noticeable to the patient;

4. noticeable symptoms, but no disabling effects;

5. more pronounced symptoms, including some limitations of body functions;

6. difficulty in the patient continuing his work, and change to a lighter job;

7. patient incapable of any regular employment;

8. immobility;

9. death.

"At what stage in the progression should the patient be labelled as suffering from the disease, or as having a 'disability'? Medical science is needed to identify the condition and to describe the progression. But if the purpose of asking the question is to determine whether the patient is eligible for benefits under a compensation statute, when the label should be applied to the condition is a question of law rather than medicine.

"With regard to etiology, diseases often come about through a combination of circumstances. Medical science is needed to identify the causative factors, and to describe in what ways each was physically significant. But when the question is the relevance of each causative factor for compensation purposes, the enquiry at that stage becomes one of law and policy, not of medicine.

"Consider the example of a worker employed by the Department of Highways. He has a primary tuberculous focus in the lung. He is stranded for three weeks following a winter storm and suffers from malnutrition and cold. Following this he develops active

and disabling tuberculosis. It is part of the discipline of medicine to determine the causative significance of the primary tuberculous focus, and of the adverse conditions to which the worker was exposed. But if the enquiry is being made for the purpose of claims adjudication, it is not part of the discipline of medicine to select and classify one of those causative factors as 'the cause' of the disability. The relevance of each of those causative factors for compensation purposes is a question of law and policy.

"Part of the difficulty is that the role of doctors employed in the claims departments of the compensation boards has seldom been clearly defined. In British Columbia, an instruction manual prescribing the role of board doctors in claims adjudication, and their interaction with adjudicators, did not come into existence until 1975. In other compensation boards, such a manual may still not exist. Thus board doctors do not simply provide an input of medical advice. They often decide whether a claim for industrial disease should be allowed or denied. When that happens, the issues of law and medicine become blurred rather than separately identified, and the evidentiary criteria applied may be criteria evolved within the medical profession. Medical opinion on questions of etiology, perhaps drawing on perceptions of the nature of scientific proof, often seems to demand a proof of the affirmative going beyond the balance of probabilities prescribed by law.

...

"Moreover diagnostic norms developed in the medical profession for other purposes tend to become applied in compensation decisions without a clear judgment being made by anyone trained in compensation law on whether they are legally relevant in that context. To an extent that is not usually apparent to the doctors concerned or to others, diagnostic norms often include, for example, assumptions about the standards of proof required that are not consistent with the terms of a Workers' Compensation Act."[61]

A worker's representative, therefore, needs access to the medical reports, and particularly the medical opinions of Board doctors, not

61 The Dimensions of Industrial Disease, T.G. Ison, 1978, Industrial Relations Centre, Queen's University, Research and Current Issues Series No. 35, pp. 13-15. An edited version of this paper was also published in (1978) 118 Canadian Medical Association Journal 200.

simply to decide whether there are grounds of appeal on points of medicine, but also to determine whether there are grounds of appeal on points of law.[62]

e) Discretion to Refuse

A possible structure might be to recognize a general right of a worker to access to the records on his claims file, but reserving an over-riding discretion in a doctor to exclude particular documents where it is his judgment that disclosure of those documents to the worker would be contrary to the best interests of the worker. This is a structure that appears to be contemplated in Part 4 of the Human Rights Act, S. 62 (1) (d).

That structure may have merit if limited to cases involving serious psychiatric disorders. But there would surely be objections to that structure in other cases. One is a risk that the exercise of the discretion would depend less upon the judgment of the doctor about the characteristics of the particular patient than upon the opinion of the doctor about what the general disclosure rules should be. Another difficulty is that such a discretionary power would substitute the value judgments of the doctor for the value judgments of the worker

62 For an example of an erroneous assumption of law issued as a medical opinion, see "Decision No. 17" (1973) 1 Workers' Compensation Reporter 78, (B.C.).

about what the worker's best interests are. Again, it would deny the ordinary right of a patient, in matters relating to his own welfare, to make a decision inconsistent with the advice of a doctor.

The doctors at the Board to whom I spoke felt that if any structure should be established in which a judgment of this type is required, it would be important that the judgment should be exercised at the time of the request for access, rather than at the time when medical reports are first produced. Their reasons for this view were:

1) It would be more efficient in the use of medical time, because it is only in a minority of cases that access to the records would be sought. It would be a waste of time for doctors to be deciding whether access should be allowed to records in the vast majority of cases where access will never be requested.

2) The condition of a patient can change, particularly in cases involving psychological disorders, and it is the condition of the patient at the time when access is sought that is critical in judging whether access to the records would be likely to result in significant harm to the patient.

f) Severability and Categorization

In any discussion of access to medical records at the Board, it may be helpful to consider the extent to which medical records are severable from other documents on a claims file, and whether medical records can be classified in a way that would enable any relevant distinctions to be made.

Any objections to the disclosure of medical records to patients usually relate to medical opinions, rather than objective data, such as the results of a laboratory test. On the files of the Board, however, these are not separate documents. The result of a laboratory test, for example, might reach the files of the Board as an item in a medical opinion, rather than as a certificate from a laboratory. Thus the distinction between objective medical data and medical opinions would not be an easy distinction for the Board to administer, even if it was considered a relevant distinction to make.

As mentioned above, claims files do not contain a medical sub-file, and the Board doctors to whom I spoke did not feel that a medical sub-file would be any help to them. When asked to advise in relation to a claim, Board doctors usually find it helpful to know the events that have occurred, as well as the other medical opinions that have been received. They find it convenient, therefore, to read the previous medical reports and the non-medical documents in chronological order.

Moreover, a medical sub-file could only separate medical records, i.e.

documents originating from medical and paramedical personnel. It could not separate medical information, because some of what is contained in medical records may subsequently become incorporated in other documents on the file.

If a structure should be established in which a worker would have a right of access to his claims file, but with a narrowly defined category of exceptions in which access might be refused because of likely harm to the worker, the Board doctors to whom I spoke felt that this would be feasible to administer. Moreover, the number of cases in which access would be refused might well be negligible. In relation to psychological problems, the controversial cases in the appeal system commonly involve mild psychological conditions when the patient would suffer no likely harm from seeing the records. These cases rarely involve psychotic states.

A possibility, therefore, which would seem to be administratively feasible, would be to prescribe a general right of worker access to his claims file (including the medical reports), but with a narrow and defined sub-category of medical reports to which access might be refused.

g) The Timing of Access

Under current practice, the representative of a worker is only allowed access to a claims file after an appeal date has been set. The access

is part of the appeal process.

The timing of access should obviously depend upon the purpose for which it is allowed. Whether it is on the human rights argument mentioned above, or for procedural due process, or for any of the other reasons suggested, it is difficult to see any reason why it should be limited to periods between the setting of an appeal date and the hearing of an appeal.

In controversial cases, recognition of a right of access is surely just as important, if not more important, before the initial decision. If an adverse decision is made against a worker who has had no notice of the issues in controversy, no opportunity to scrutinize the evidence being considered by the Board on those issues, and no opportunity to present evidence and argument in rebuttal of that evidence, it would surely not be surprising if the worker sees the Board decision as peremptory, arbitrary, and unfair. For the reasons explained above,[63] procedural due process in workers' compensation matters is more important for decisions at first instance than on appeal.

The responsibilities of the Board, however, include investigation as well as adjudication. Investigators' files are usually treated as confidential in most investigative systems, and if the file indicates the manner in which an investigation is likely to proceed, it could be

63 Chapter II, Section 1.

counter-productive for that to be disclosed before the investigation has been completed. This might well be considered, therefore, a ground for refusing access to a claims file during the period in which an investigation is pending; provided that access is allowed after completion of the investigation, and before the decision.

h) Total or Partial Access

A lawyer obtaining access to a claims file in the Legal Department of the Board sees the full file. Other representatives obtain access at the Appeals Branch, and see the file after it has been "purged" or "stripped". This process is carried out by an Appeals Administrator. The file as seen by the representative should include:

The Form 6 (if there is one) and Form 7.

The Form 8, and all subsequent medical reports from doctors outside the Board.

A Summary of Payments.

Memos from staff doctors, unless the doctor specifically requests that a memo be excluded.

Reports of rehabilitation consultants.

Memos of adjudicators or inquiry clerks recording information received by telephone.

General correspondence.

Medical reports are normally left in, even if they are irrelevant to the immediate purpose of access; for example, even if access is being sought for an appeal that relates only to the wage rate on the claim.

The documents that are stripped from the file before allowing access are:

Payment vouchers relating to accounts paid.

Internal telephone slips requesting the file.

The memo from the adjudicator to the Claims Review Branch indicating the proposed decision.

Redundant or misleading memos.

Carrier memos (slips indicating the transmission of the file between departments).

Duplicates of documents.

Memos indicating rumour (these may be used as leads to investigation, but they should not be used as evidence).

Memos containing impressions or ideas relating to the case, or judgmental comments between staff.

With regard to this last item, some analogy might possibly be drawn with the court system. The evidence and argument presented to the tribunal are exposed to the view of all parties. But the impressions formed by those passing judgment (for example, discussions among members of the jury about whether to believe a witness) do not become part of any record available to the public or to the parties. It is, however, still normal to find comments of this type included in the decision of a judge sitting without a jury.

A document which one might think should be included whenever access is allowed to a claims file is the memo from the adjudicator to the Claims Review Branch. This is the critical document from which to derive an understanding of how the decision was reached. The headings on this memo are:

THE ISSUE

FACTS AND OPINION

THE ADVERSE DECISION

AUTHORITY OR POLICY REFERENCES

The stripping of this memo from the file may be another consequence of keeping the Claims Adjudication Manual secret. But stripping this memo denies the representative the opportunity of examining the key document from which to understand how and why the initial decision was reached.

i) Differential Access

Current practice of the Board allows access to a claims file to certain categories of workers' representatives, but not to other categories of representatives, and not to a worker acting without a representative. This might be seen as a denial of equal justice. It is generally considered a basic principle of justice that rights and opportunities in the processes of adjudication ought not to vary according to whether a party is represented. He should have just as much right to act for himself. Thus in relation to differential access, the 1973 Task Force stated that:

> "selectivity in this matter is indefensible... The current practice of keeping the appellant ignorant of relevant facts regarding the case cannot in our opinion be sustained on any

justifiable grounds".[64]

Similarly, a legislative committee more recently concluded that:

> "...a policy of disclosing a file to some individuals and not others cannot be reconciled with any reasons the Board has given to date. For example, if an employer's lawyer is able to review the Board file personally then, at the very least, the employee whose injury is the subject of appeal should, if he is not represented, have an opportunity of reviewing the Board's file on his own. In fact, to disclose a file to counsel for an employer and not to an employee puts the employer at a distinct advantage in the appeal process and is, in this Committee's opinion, a denial of natural justice to the employee".[65]

Apart from objections based on the denial of natural justice and the concealment of documents from the workers affected by them, it might also be objected that as long as access to claims files is treated as a discretionary matter, this could have a restraining influence on criticism of the Board. Discretionary access might be seen as a restraint on free speech. This apprehension may be aggravated by the undertaking that representatives are required to sign when seeking access to a file. The undertaking includes:

> "I will undertake not to use such medical or other information publicly or for any purpose except for his Workmen's Compensation Board appeal". (my emphasis)

Thus, for example, if a representative, when examining a file, should discover a Board procedure that he feels is objectionable, he has

64 Report of the Task Force on the Administration of Workmen's Compensation in Ontario, 1973, pp.32, 33.

65 Third Report of the Select Committee on the Ombudsman, 1st Session, 31st Legislature, Ontario, 1977, p. 68.

promised not to use that information for public criticism of the practice. It may well be, however, that this was never intended, and this point could be mitigated by changing the undertaking.

No revision of the undertaking could, however, overcome the objection that discretionary powers to control access to information can have a restraining influence on the public right of criticism. Moreover, this can occur regardless of motive, and regardless of how the discretionary powers are exercised, or for what purpose.

There are, however, two points that might be mentioned in support of current practice. First, the analogy of the court system might be used to justify differential access to an adjudicating tribunal by different classes of representatives. In the higher courts, lawyers are allowed to act as the advocates of parties. Other people are not. The analogy of the court system would not, however, justify any distinction between those who engage a representative and those who do not.

Secondly, the practice of differential access may have had a transitory advantage, enabling the Board to feel its way in allowing access to files. The category of representatives authorized to see a claims file has been gradually expanding. If the demand for equal justice and equal procedural opportunities had been treated as paramount throughout the years, the Board would have had to elect between making a claims file available to the worker and any representative, or keeping it entirely secret. The move from total

secrecy to total disclosure might well have been feared as too big a jump, with consequences too unpredictable. Reform is often easier to accomplish if it proceeds in small steps from the current position. As the Board discovers that some disclosure results in no apparent harm, it may feel more confident in moving to more disclosure. Thus differential access might well have been beneficial for a transitory period, even though it may be thought indefensible in the long-run.

8. Employer Access to Claims Files

a) Introduction

Employers do not have any general right of access to the documents on a claims file at the Board. Companies do, however, receive information in various ways. Perhaps the two most important are:

1) the provision of medical information to company doctors;

2) access fo file documents in co ection with appeals.

b) Reports to Company Doctors

Where a worker is treated at the Board clinic, a company doctor will automatically receive from the Board copies of the admission report,

progress reports, and discharge summary. The consent of the worker is not sought, and the worker is not informed that these reports are transmitted to the company doctor.

Other medical information on a claims file is not sent to company doctors as a normal routine, but is transmitted in response to requests. When such a request is received, the Board will not send copies of the original reports, but will send a resume. Again, the consent of the worker is not sought, and the worker is not informed. It is understood that a company doctor will treat these reports and resumes as confidential, and will not disclose them to company management.

The objective of the Board is usually to assist the company doctor in providing advice to management on rehabilitation. But it may sometimes be for some other purpose, such as assisting the company doctor in monitoring the effects of exposure to a contaminant.

The understanding of union officials to whom I spoke is that the disclosure of medical information by the Board to company doctors is more extensive; that medical information is sent by the Board to a company doctor in <u>every</u> case routinely where a company doctor is identified on the Form 7, or where the Board is subsequently notified that the company has a physician; that the information is used for appeals as well as rehabilitation purposes; and that it goes to the personnel office and may subsequently be used on disciplinary proceedings.

The union officials were concerned that medical information is sent by the Board to company doctors in all cases, not just those involving treatment at the clinic, or involving a problem of rehabilitation. They are also concerned that this is done without the authorization of the worker.

The company officials to whom I spoke agreed that the discharge reports from the Board clinic were passed on by company doctors to management officials. But they say that this practice has been changed; that it is now understood that the discharge reports must be treated as confidential, and that no medical reports must be passed on from the company doctor to management.

One difficulty, of course, is that company doctors are engaged for a variety of roles, and once medical information has been provided by the Board, it does not, as a practical matter, have any control over its subsequent use.

One possibility might be to prohibit the supply of information to company doctors without the consent of the worker concerned. The value of such a consent would, of course, be limited. In serious cases, the consent would be sought at a time of disablement, when the self-confidence of the worker and his outlook for the future may well have been shaken. It would not be surprising if he should have some apprehension that a refusal of consent might prejudice his eligibility for future compensation benefits, or his opportunities for future employment. On the other hand, a requirement of written consent might

at least have the advantage of letting the worker know what is happening. Moreover, the fact that the consent might be sought in a situation that creates a psychological pressure to consent is hardly a ground for denying a worker the opportunity to refuse consent if he still so wishes. An alternative may be to require that medical information about a worker can only be transmitted to a company doctor by being sent to the worker for passing on.

A further alternative might be a total prohibition on the provision of medical information by the Board to company doctors. That would eliminate any risk of the information being used in a negative way by management for decisions against the worker. But it would also prevent a conscientious company doctor from using the information in a positive way for the protection of workers' health.

Among the company representatives to whom I spoke, it was felt that the provision of medical reports to a company doctor is often necessary for rehabilitation purposes. But the view was also expressed that these reports are supplied more often than they are needed, and that in many cases, it would be enough if the Board would respond to specific questions. A company, whether the previous employer of the worker or a potential new employer, may like to know whether the worker has any residual weaknesses or sensitivities. For example, a job may involve exposure to a chemical that is usually harmless, but which could be injurious to someone who has been previously sensitized, or who is for some other reason unusually susceptible. In such cases, an answer from the Board about any susceptibility of the worker to the

particular chemical may give the company all that it needs without the provision of medical reports.

The position of a company doctor is perhaps inevitably a compromising one, and it may be this that makes it difficult to develop any system of information flow, or of confidentiality, that will inspire the confidence of all concerned. Any doctor is in a difficult position if his employer or client is a different person from his patients, and if, in relation to health issues, the interests of the former differ to some extent from the interests of the latter.[66] Thus company doctors are often perceived in the labour movement as guardians of corporate finances rather than guardians of workers' health. Indeed, some company doctors appear to concur in that perception of their role.[67]

A matter of particular concern among union officials is that corporations should not pool medical information about workers in a co-operative data bank accessible to all corporations. The company representatives to whom I spoke assured me that, at least as far as they know, no such data bank exists. Moreover, they would share the view of union officials that no such data bank ought to exist.

Apart from its relations with the worker concerned, there are some

66 See supra fn. 61 p. 10.

67 See e.g. Brief of the Occupational Health Section of the O.M.A. to the Task Force on the Workmen's Compensation Board of Ontario, 23rd May 1973.

situations in which a company might need medical records for inter-action with some outside person or group. For example, a Schedule 2 employer may need medical records for the conduct of a subrogation claim. When medical records are required for this purpose, it is apparently a common practice to seek authorisation from the employee, and then to obtain medical reports from the doctors concerned.

c) Access to Files in the Appeal Process

The summary prepared by the Board for the purpose of an appeal is available to the employer, as well as the worker, or the representative of either. This summary includes the medical information on the claims file.

Among the company representatives to whom I spoke there appeared to be a consensus that these summaries are helpful, but some different views about whether they are sufficient. One view was that access to the claims file is important in preparing for an appeal, and that equal access to the claims file by company and worker representatives is necessary for procedural due process. Another view was that company representatives can live with the summaries, even if worker representatives are allowed full access to the file.

The practice of the Board is that a lawyer representing a company in connection with an appeal will be allowed access to a claims file on

the same basis as a lawyer representing a worker. But other company representatives are not allowed access. Until recently, access was only permitted to a lawyer in private practice who acted for the company as one client among others. Recently, however, this right of access has been extended to include a lawyer on the staff of the company.

There are several difficulties with the current practice. One is that the Board expects a lawyer to use information obtained from a claims file only for the purpose of conducting the appeal, and not to communicate such information to the company. This might be seen as incompatible with the normal obligations of a solicitor-client relationship. It is normally considered a client's right to know any information obtained by a lawyer in the course of acting for the client.

Another difficulty is that the practice puts a premium on companies using a lawyer rather than some other type of representative. While it may well be thought right that companies should be allowed to engage a lawyer, it may also be thought undesirable to adopt practices that encourage them to do so. The lawyers engaged do not generally specialize in workmen's compensation. Their normal practice lies in other areas, and it would not be surprising if their normal experience is in relation to tribunals operating on the adversary system. The result may be, therefore, a tendency to make Board proceedings more adversarial.

Among the union officials to whom I spoke, there was intense resentment

at the use of lawyers as company representatives. If I understand it correctly, this resentment rests on feelings of the following kind. First, lawyers sometimes raise points of a technical nature rather than focusing on the merits of a case. Secondly, they tend to use an unfamiliar jargon that makes it difficult to understand their points, and therefore difficult to respond. Thirdly, there may be less sensitivity to the feelings of a worker if the company position is being presented by a lawyer than if it was presented by, for example, a personnel officer or safety officer. Fourthly, although the relationship between union officials and corporate managements often involves conflict, that still takes place against a background of common understanding. That background of understanding serves some of the same purposes as pleadings in a civil action. It helps each side to recognize the issues, and to know what to expect of the other in the process of dispute resolution. But a lawyer coming on the scene brings a different background and a new range of perspectives. This may result in issues being raised that take the union by surprise, and which are therefore seen as unfairly raised.

Finally, and perhaps most important, any widespread use of lawyers by corporations might be seen as back-tracking on a historic compromise. On behalf of working people, organized labour acquiesced in the termination of tort claims against employers in return for a new system of workmen's compensation. There were areas of controversy and conflict. But there was also a substantial area of common understanding, and of compromise and bargain that led to the first Workmen's Compensation Act. In particular, one of the attractions of the new system was to be the

adjudication of claims by a process of administrative enquiry that would mark an end of hassles with the legal profession. The new tribunal was to be one in which labour and management representatives could sit down together. Thus the recent expansion in the use of lawyers by corporations might be seen in the labour movement as welshing on a deal.

Procedures for access to claims files which put a premium on the use of lawyers by corporations might, therefore, tend to result in some of this resentment spilling over onto the Board.

If it is felt that the practice of differential access (allowing a lawyer access to a claims file on behalf of a company, but not other company representatives) is indefensible, the rational alternatives would seem to be either a total denial of company access to a claims file, or to make the file accessible to any company representative. Worker representatives may well prefer the former. Among the company representatives to whom I spoke, the feeling seemed to be that the accessibility of medical information to them at the moment was either sufficient, or that they needed more. None suggested that current practices provided more than is necessary.

The dilemma for the Board is how to prevent companies from having unlimited access to the medical records on a worker's file while at the same time recognizing the right of an employer to the elements of procedural due process.

Although not adhering to this principle rigidly in all aspects of claims adjudication, it is still the basic position of the Board that workers and employers should have equal procedural opportunities. Thus in response to the demand for full disclosure, it has been said that:

> "In granting such access on a systematic basis, workmen must recognize that their employers will also have similar access and that the information given to one should not differ in substance from that given another."68

Among the union officials to whom I spoke, some felt that the principle of equal access ought to be accepted, one view being that it is fair, the other view being that it would not involve any real concession on the part of workers because they feared that medical and other records relating to a worker would reach the files of corporations in any event regardless of any legislative prohibition.

Another view, which might be the prevailing view in the labour movement, is that the principle of equal access is wrong, and ought not to be conceded. The first argument is that making information on a claims file available to the worker is not primarily a matter of procedural due process but is primarily a matter of human rights. The file relates to a human being. His interest in knowing what it contains is infinitely greater than the interest of anyone else, and his interest is not

68 Paper by M. Starr at a panel discussion on Secrecy or Disclosure of Medical Information at the Association of Workmen's Compensation Boards of Canada, 1974 Annual Conference, p. 8.

limited to the preparation of argument for a pending decision. In other words, a worker should be allowed access on the same basis as people are allowed access to personal files in the federal system under the Human Rights Act.

Alternatively, even if access is perceived simply as a matter of procedural due process, it could still be argued that equal procedural opportunities are inappropriate because the interests to be protected are significantly different. The interest of a worker in a compensation claim is infinitely greater than any interest of a company. For the worker concerned, his livelihood, at least for a period, and in some cases for life, may be at stake. For his employer, however, all that may be at stake would be an adjustment to his W.C.B. assessment, which in any event might be only a marginal item of business expense.

If compensation costs are considered in aggregate, rather than in relation to a particular claim, the argument does not significantly change. The costs in aggregate are, to some extent, borne by employers. But they are also to some extent passed forward in the price of products, or passed backwards as opportunity costs to labour.

An alternative, and perhaps stronger argument, is that the demand for greater access for a worker does not rest simply on the ground that he has greater financial interests at stake, but also that he has greater other interests.

It is workers who suffer the pain and anguish of industrial disabilities,

and the fear of further deterioration. It is they who suffer any subsequent limitations on social life or future employment. In some cases, it is they who are rendered immobile. In the fatal cases, it is their widows and children who are left to mourn. Small employers are often exposed to the same risks. But corporations have no comparable interest in industrial disabilities. It may seem like a callous, and bureaucratic or legalistic, reaction to the human predicament to say that any procedural rights for the victims of disablement must be matched automatically by equal rights for corporations.

Again, the interest of a worker in personal privacy may be adversely affected by the disclosure of documents on his claims file to a company. But the company has no similar interest that could be adversely affected by the disclosure of documents on a claims file to the worker.

It is important to recognize here that medical reports do not always focus exclusively on a particular limb or organ that is primarily involved in a particular claim. They usually include medical and other information of a general nature about the worker, and they may include sensitive personal information. For example, if there is doubt about the etiology of a disability, one theory being employment causation, and another theory being events in the private life of the worker, the Board must investigate the evidence to determine which hypothesis is the more credible. Any medical report that is part of that enquiry might well, therefore, include a consideration of any causative factors (such as domestic problems) in the private life of the worker as well as causative factors in his employment.

An argument in support of company access to a claims file is that if such access were not allowed, corporate organizations might respond by demanding the promulgation of regulations under Section 21 (2) of the Act, so that a worker claiming compensation might be required to submit to a medical examination by a doctor appointed by the company. This might well be resented by workers. In the Board and elsewhere, it might well be perceived as marking a step backwards towards the adversary system. If, therefore, it should become seen as the logical alternative to company access to claims files, the latter might be seen as the lesser evil.

9. Access of Others to Medical Information

S. 99 of the Act provides that medical reports supplied to the Board are "... for the use and purposes of the Board only...". There are, however, some conventional practices relating to the exchange of medical information among adjudicating agencies. In particular, the compensation boards of the various provinces exchange medical information. It is often helpful, in the adjudication of a claim, to know what the medical evidence was on a preceding claim in another province. For example, the same worker may have suffered a second injury in the same area of the body, or may have been exposed to contamination in two provinces in succession. There is no systematic notification to a worker when medical information is being sought from or provided to another province, but no secret is made of the practice. It is commonly mentioned, for example, in letters to the worker concerned.

Similarly, the Board exchanges medical information with the Department of Veteran's Affairs, and the Canada Pension Plan.

The Board does not normally receive requests from the police for access to the claims files. But city police forces and the O.P.P. have been allowed access to claims files, and to take copies of documents in two situations.

1) At the initiative of the Board, when there has been some ground to suspect a fraud on the Board, and the police have been requested to investigate.

2) At the initiative of the police when, in the course of some investigation into another matter, they have come across some evidence of a fraud on the Board.

10. Clinic Files

The patient files maintained at the Hospital and Rehabilitation Centre of the Board are standard hospital files. They include a patient history, intake administration form, progress reports, and discharge summary. Copies of the intake administration form, progress reports and discharge summary go into the claims file of the worker at the head office of the Board.

It does not seem to me, therefore, that any separate discussion of the clinic files is required in this report.

11. Form 7

The Form 7 is usually the document on which a claim file is opened. It is an employer's report to the Board of a worker's injury or industrial disease. A copy of every Form 7 is sent by the Board to the Occupational Health and Safety Division of the Department of Labour. In all industries covered by a safety association, a copy is also sent to the safety association.

The safety associations use the Form 7's for the compilation of statistical data.

At the Industrial Accident Prevention Association[69] I was advised that the Form 7's are filed by company. The Association does not keep any files by name of worker.

A copy of a Form 7 is not sent to the worker concerned, or to any union.

Among the company representatives to whom I spoke, the view was expressed that a Form 7 should be available for the employee to see. Among union officials, it was felt very strongly that a copy of each Form 7 should be sent automatically by the Board to the worker on every claim.

69 This was the only safety association at which I enquired.

The Board would be reluctant to do this, because:

1) The administrative cost would seem out of proportion to the possible benefit, considering that the bulk of claims are not controversial.

2) The names of witnesses would be disclosed, and the Board would object to this particularly before any necessary field enquiries have been conducted.

3) The worker would be aware of every employer protest, and that might tend to promote ill-will between labour and management.

In some cases, particularly those involving serious disablement, it could also generate unnecessary anxiety. This could occur, for example, if the employer reports adverse information which the Board discovers to be untrue before any issue is discussed with the worker.

It may be helpful to itemize the reasons why a worker may want to see the Form 7.

First, if a claim is controversial, seeing the Form 7 would enable the worker to know what the employer has told the Board. The worker could then consider what to say in response. This, however, is an argument for providing a copy of the Form 7 to the worker on request, or in cases where the decision may differ from what the worker wants. It is not a reason for sending a Form 7 to the worker in every case.

Secondly, even in non-controversial cases, a worker at the moment does not receive enough information to check that the wage rate being used on the claim is correct. The Board takes the earnings for a preceding period as reported by the employer, and a complaint among unions is that

employers sometimes omit overtime. The Board is, however, aware of this problem, and is currently working on a computer program that will print out, in the statement that accompanies each cheque, the pre-accident earnings rate of the worker, and the pre-accident period used to calculate that rate. If this is done, each worker will receive automatically enough information to check that the wage rate on the claim has been correctly calculated.

Thirdly, however, it might still be argued that other statements in a Form 7 can be significant even in non-controversial claims. In particular, there is no way of knowing how long a claim will remain non-controversial. For example, the worker may recover from his injury, but he may allege a recurrence in five years' time, and apply for a re-opening of the claim. If the Form 7 is the only record on the file of the Board of what the worker and the employer said at the time, there is a danger that it may be treated by the Board as an uncontradicted record when the truth is that the worker had no opportunity for contradiction.

Since the Board discontinued requiring a Form 6 as a general practice, the Form 7 has taken on the character of being the employee's report to the Board as well as the employer's report. Thus without seeing the Form 7, an employee is not only uninformed about what the employer has told the Board, he is also uninformed about what he is himself reported to have said.

Fourthly, if the Board neither requires a Form 6 nor provides the worker

with a copy of the Form 7, this may tend to promote the image of the Board as being "in cahoots with the corporations". The Board is an adjudicating tribunal responsible for the exercise of an impartial judgment between workers and management. If the Board appears to be reaching its conclusions by a process of communication only with management, that may tend to tarnish the image of impartiality, even though the decisions reached in this way are almost all decisions allowing claims.

12. Disability Awards

Where a compensable injury results in permanent disability, the status of the claim will be changed at some stage from temporary to permanent. This may coincide approximately with the time when the worker returns to work, or when he is thought to have reached the point of maximum recovery. The temporary time-loss benefits are terminated, and a permanent pension is substituted.

Unless the worker is classified as totally disabled, the Board must establish a degree of partial disability. This is expressed as a percentage of total disability, and in Ontario, establishing that percentage rate is treated as a medical question. In partial disability cases, the percentage so established is applied to the rate of compensation that would be payable for total disability to arrive at the dollar amount payable in the particular case.

An explanatory pamphlet on pension assessments is handed to everyone who comes for a pension examination.

In controversial cases, for example, where there has been a dispute about the extent of the residual disability, the decision is contained in a composed letter. Otherwise the decision is communicated in a form letter. This form now tells the recipient the percentage rate at which his disability has been assessed as well as the dollar amount of the pension (the former practice was that only the dollar amount was communicated).

There are strong feelings outside the Board that a pension decision should include a statement of the nature and extent of the disability on which the pension is based. Thus the management representatives to whom I spoke felt disappointed by the brevity of disability award decisions, and felt that they should include the diagnosis. The union representatives to whom I spoke were of the same view. They felt that the diagnostic conclusion of the Board should be included in the pension decision, and that it should go to the worker and the union representative. They would not object to it going also to management.

The difficulty at the moment, of course, is that without such a statement being included in the decision, neither worker nor management representatives can make a rational judgment on whether to appeal, or on what grounds.

For example, a worker's representative may feel that a pension is too

low. But how can he prepare for an appeal? Should he submit medical evidence showing that the disability of the worker is more extensive than the Board thinks it is? He cannot know whether that will be relevant unless the Board has first issued a conclusion on what the extent of disability is. Nor can he go to the appeal confident that the Board agrees with him on exactly what the disability is, and argue simply that the percentage rate for that disability ought to be higher.

Any management representative who wants to appeal a pension assessment, or to oppose an appeal, has a similar difficulty. It is impossible to define the issue precisely, and therefore, impossible to decide exactly what is relevant, without having a pension decision from the Board that includes a clear descriptive statement of the nature and extent of the disability that the Board has found.

CHAPTER III

INFORMATION FLOW IN OTHER ASPECTS OF BOARD OPERATIONS

1. Rehabilitation

The main function of the Rehabilitation Branch is counselling for vocational rehabilitation, supplemented in some cases by other aids to rehabilitation, such as aptitude testing or re-training. The Branch also has an adjudicative role in relation to rehabilitation expenditures, and in relation to requests for the commutation of pensions. The reports of rehabilitation consultants also provide an input for claims decisions, particularly with regard to the continuation or termination of supplements under Section 42 (5).

A separate file is maintained in the Rehabilitation Branch in respect of each worker who receives attention from that Branch. The reports of rehabilitation consultants and social work reports are maintained in those files. But copies of those documents also go on to the claim file. There may, however, be some additional documents on the rehabilitation file which are not on the claim file, such as reports of psychological testing from the Board clinic, or from an outside psychologist.

The workers concerned do not receive copies of test or job assessment

reports.

The reports of rehabilitation consultants may include, apart from the current employment situation of the worker, a great deal of other information or comments relating to the fitness of the worker, the home situation, any domestic problems, any financial problems, the worker's response to advice, comments on attitude, employment history, any criminal record, and any problems of adjustment.

The arguments relating to access to file documents for the worker concerned, the employer on the claim, or their representatives, are similar to the arguments raised above in relation to claims.

There is, however, an additional argument for access to rehabilitation files. This is probably the area of Board functioning in which quality control techniques are the most difficult to establish. Also there are various pressures militating against a positive and thorough rehabilitation role. It may well be argued, therefore, that worker access to his rehabilitation file is particularly important as an aid to quality control.

As a practical matter, access is not generally sought in the Rehabilitation Branch. Any worker, employer, or representative of either who is seeking access to rehabilitation reports would normally seek that access via the claims file, and access would be allowed or denied as described above.

It is normal practice to exchange information about a worker with other agencies concerned with job placement, or other aspects of rehabilitation, such as Canada Manpower, the Social Services Department, or the compensation boards of other provinces. There are no fixed rules or guidelines in the Branch relating to the provision of rehabilitation documents to other agencies, except that the Minister and the Ombudsman get everything.

Some information about a worker will also, of course, be supplied to potential employers. In ordinary cases, rehabilitation counselling may simply take the form of advice to the worker in seeking re-employment. But in the more serious cases, a rehabilitation consultant may play a more active role in job placement, which can include talking to potential employers. When functioning in this way, the role of a rehabilitation consultant involves salesmanship. The questions of a potential employer must be answered, and it may be necessary to explain the nature and extent of any residual disability that the worker may have. But it is also part of the role of a rehabilitation consultant to put the emphasis on what the worker can produce, and to encourage a potential employer to think positive. Moreover, successful rehabilitation work requires judgment in responding to individual situations, and a good rehabilitation consultant will not be one who always follows a standard routine. For these reasons, it is usually considered important that a rehabilitation consultant should have a free discretion on how much to tell a potential employer about the worker concerned, and that this discretion should not be fettered by any fixed rules of disclosure or confidentiality.

Information is normally conveyed to a potential employer verbally, not by letter, and copies of medical or rehabilitation reports are not supplied.

There is no systematic provision for obtaining the consent of the worker to each disclosure of information. But it is good rehabilitation practice to maintain a close liaison between the rehabilitation consultant and the worker concerned in which each keeps the other informed of what he is doing.

The Rehabilitation Branch maintains a Branch Manual similar to the Claims Adjudication Manual. It includes adjudicative criteria as well as other operating rules of the Branch. It is in loose-leaf form. Each rehabilitation consultant is provided with a copy. Like other adjudicative manuals at the Board, it is treated as confidential. The arguments for publication of this manual are much the same as for the Claims Adjudication Manual. Here again, I cannot think of any argument that would seriously stand reflection for keeping this manual secret.

2. Control of Treatment

One of the functions of the Board is to monitor the quality of medical treatment received by injured workers. For example, the Board tries to avoid having medical treatment rendered by anyone whose qualifications are not considered sufficient for the particular treatment. Much of the monitoring takes the form of discussion between a Board doctor and a

treating doctor. For example, if it should appear that an injury is not following the normal course of recovery, a Board doctor might suggest to the attending physician that it may be time that the patient saw a specialist.

The aspect of this that has sometimes been controversial in the past has been the requirement that prior to elective surgery Board approval must be obtained. The purpose of this requirement is to avoid any operation that may be unnecessary, or that is likely to be counter-productive.

When a Board doctor is doubtful about the wisdom of an operation, and perhaps feels that other treatment should be tried first, the matter may well be resolved in discussion between the Board doctor and the attending physician. If it is not resolved in that way, the patient will often be referred to another specialist for another opinion.

I recall that some years ago, there were some complaints from workers or their representatives, the essence of the complaints being that the Board had refused an operation and had not explained why. I have not heard, however, of any complaints of this kind in Ontario in recent years.[70]

70 Board officials and outside representatives to whom I mentioned this could not recall any recent complaints of this type.

A possible explanation why the complaints have withered might be that in medical debates and literature in recent years, communicating with patients has been a topic of lively discussion. Perhaps it is possible that the specialists concerned are now more effective in explaining the situation to patients. Also I was assured that it is now Board policy to encourage the advising consultant to explain his opinion and reasons to the patient, as well as submitting his written report to the Board.

Regardless of any controversy, however, it could surely be an improvement if the report of the advising consultant was written for the patient as well as the Board, with a copy being sent to the patient. People do not always remember what they are told in a doctor's office. If the situation is one where the judgment is marginal, and the operation would not result in more than limited improvement, one would think that it might well be an advantage for the patient to have that in writing so that he can refresh his memory of the consultant's advice from the letter. Otherwise, when he gets home and discusses the proposed operation with his family, undue optimism may build up, with a risk of subsequent disappointment at the limited results.

3. Assessments

The assessment system is administered in the Revenue Branch of the Board. Every employer in an industry listed in Schedule 1 of the Act should be registered with the Board and file assessment returns.

Schedule 1 divides employers into 27 classes by type of industry or operation, and within each class, employers are assigned to rate groups, which are like sub-classes. Thus each new employer registering with the Board must be assigned to a class and a rate group.

If the classification is not clear, perhaps because of some uncertainty about the nature of the business, the Board will try to clarify the matter by telephone inquiries, by correspondence, or by a Board official visiting the business.

Once the factual situation has been clarified, if there is still some doubt about how the employer should be classified, the question is referred to the Revenue Classification Committee. The decisions of this Committee are recorded in a Minute Book. Each minute deals with one employer. It shows the details of the business operation, and the conclusion of the Committee about how it should be classified.

Copies of these minutes are sent to all assessors and auditors of the Board for their future guidance.

This Minute Book is not available to the public. I doubt whether there is any practical problem here, because it would only be on rare occasions that anyone would want to see it, and the kinds of information contained in each minute about each business are the kinds of information that most businessmen would like the public to know. But there is a question of principle. There are feelings in the business community that when information is supplied to government in the

performance of statutory obligations, that information should be used only for the purpose for which it is supplied and should not be made available to the public. This is simply one aspect of the ordinary right of a businessman, like anyone else, to decide for himself what information about the business he wants to make available to the public.

One would think it might be helpful, however, and certainly more consistent with due process, if a copy of each minute was sent to the employer affected by the decision. This would enable the employer to see that the statement of facts that the Board has used in making the classification is correct. When the facts have simply been supplied by the employer and taken from his letter, sending a copy of the minute may be superfluous. But when the facts have been ascertained by field enquiries or in other ways, it could be useful as a check against any risk of error or misunderstanding.

There is no manual of adjudicative criteria relating to assessment classifications of the same style as the Claims Adjudication and Rehabilitation Manuals. There is a precedent book kept in card index form, and there are some precedents of decisions from assessment appeals. There are also some opinions from the Legal Department that are used as guidelines, for example, in deciding who is an employer. As a practical matter, the Board does not receive outside requests for access to this material.

If it should be considered important that the adjudicative criteria used in the assessment process should be available to the public, and

if it should also be considered important that the information obtained by the Board about the business of each employer should be treated as confidential, it may not be possible to achieve both objectives without some revision of the recording systems.

The assessment returns filed by each employer with the Board show aggregate figures for payroll. They do not name individuals, except where voluntary coverage is purchased for people who would not otherwise be covered.

A system of experience rating is applied in each rate group where the employers concerned have voted for it. About 11,000 firms out of 150,000 are on experience rating.

Each employer receives a regular billing. Where experience rating applies, there is an additional invoice showing any credit or debit for experience rating.

Each employer is also sent a monthly statement of the claims costs incurred during that month in respect of claims arising out of his employment. That statement will show the claim number, employee's name, type of cost, and the amount. There is also an annual summary of costs to date for the year.

Section 9 of the Act creates liabilities upon a principal for assessments in respect of employees of a contractor or sub-contractor. It is a common practice to meet this obligation by ensuring that each contractor

and sub-contractor is registered with the Board and paying assessments. In this connection, the Board receives a constant inflow of telephone enquiries about whether a particular company is registered with the Board and in good standing. Where the answer is positive, and it is required in writing, which would be normal, the Board issues a "Certificate of Clearance". In some cases, the Board may give a positive response by telephone. Similarly, if the enquiry is of a different type, and the enquirer is only interested in whether a company is registered, the answer may be given immediately by telephone. If the assessments on the company concerned are in arrears, it is Board policy to avoid an immediate response, and to give the company concerned a few hours or a day to bring its assessments up to date before replying. As well as being a courtesy to the company concerned, this practice may have advantages for the Board in the collection of assessments.

The Board does not make enquiries to determine whether a contractor-principal relationship exists before responding to enquiries of this type. That could be costly, and also pointless. The management and labour representatives to whom I spoke all felt that whether an employer is registered with the Board and paid up to date could be treated by the Board as public information.

If there was a legislative obligation on the Board to respond to enquiries of this kind, it would probably not require any change from current practice. But it may have the advantage of protecting the Board against any possible complaint of disclosing confidential information.

Apart from contractor situations, the Board also sometimes receives other enquiries about whether an employer is registered. For example, an insurance agent may be interested for the purpose of selling insurance, or a potential employee might be interested. The entitlement of an employee to benefits under the Act does not depend upon whether his employer is actually registered and paying assessments. But it does depend upon whether the employer ought to be registered, in other words, whether the employment is covered under Part 1. Asking whether the employer is registered is probably the easiest way for a potential employee to check on that.

Although the Board responds to enquiries about whether a particular employer is registered and in good standing, it does not make available any list or index of accounts in arrears. This would, of course, involve very different considerations. Anyone wanting such an index or list would be enquiring for different purposes, and as a practical matter, the most likely enquiries of that kind would surely come from credit reporting agencies.

At first impression, that might seem like a useful development. Unlike most creditors, the Board is also the adjudicating tribunal on the amount due. For credit reporting agencies to receive a list of accounts in arrear from the Board would, therefore, be more reliable than receiving similar information from other types of creditors, because there would be no risk of any disparity between debts and claims.

But any such disclosure could impair the opportunities of the Board in

its collection processes. Subject to any contractural obligations, a creditor is normally entitled to decide for himself whether to report accounts in arrear to a credit reporting agency. Moreover, he can decide on a general policy, or he can make the decision case by case. Creditors usually like as many options as possible in deciding on collection strategies. Any requirement that the Board must publish a list or index of accounts in arrear, or any requirement that it must not do so, could operate to limit its options, and therefore possibly to make its collection efforts less effective.

The current practice of the Board is to use credit reporting agencies for obtaining information in connection with its collection work. But apart from the information that credit reporting agencies may learn in that process, the Board does not report accounts in arrear.

4. Penalty Assessments

The Board has power to levy penalty assessments in response to hazardous conditions observed upon inspection.[71] But in practice, that power is not used. The Board also has power to impose additional assessments in response to a claims experience well above average for the industry,[72] and this power is used frequently.

71 S. 86 (4).

72 S. 86 (7).

S. 86 (7) provides that:

> "Where the work injury frequency and the accident cost of the employer are consistently higher than that of the average in the industry in which he is engaged, the Board, as provided by the regulations, may increase the assessment for that employer by such a percentage thereof as the Board considers just, and may assess and levy the same upon the employer, and may require the employer to establish one or more safety committees at plant level".

The relevant regulation provides that:

> "The increase of assessment that the Board may levy under sub-section 7 of section 86 of the Act shall be levied where an employer within an individual rating classification,
>
> a) has incurred in two of the last three complete years of operation a deficit accident cost experience, including his proper share of administration, safety and other expenses;
>
> b) has incurred a lifetime deficit accident cost experience, including his proper share of administration, safety and other expenses; and
>
> c) has incurred during two of the last three complete years of operation a frequency rate of compensable accidents at least 25 per cent higher than the average rate in the industry in which he is classified.
>
> 2) The actual payroll for the last complete year of operation under review shall be the basis for any additional assessment to be levied under sub-section 1.
>
> 3) The first increase in assessment under sub-section 1 shall be 100 per cent of the assessment based on the individual rating classification of the employer.
>
> 4) The amount of the increase on any subsequent increase in assessment under sub-section 1 shall be in the discretion of the Board".[73]

73 R.R.O. 1970, Reg. 834, S.7.

A penalty assessment under S. 86 (7) may be in addition to experience rating, or it may be applied to an employer in a class not covered by experience rating.

The initial decision of the Board under S. 86 (7) is essentially mathematical in character. The prescribed formula is made part of a computer program that automatically brings to the attention of Board staff the situations in which a penalty assessment under S. 86 (7) should be levied.

If the employer appeals, however, different criteria apply. Apart from considering any objections to the arithmetic, or the claims record, the Board will consider, on an appeal, whether the employer has taken steps to improve the health and safety conditions at the place of employment since the penalty assessment was levied.

This practice of applying different criteria on appeal from the criteria applied at first instance has been strongly criticised in the past,[74] and indeed, it is a general principle of justice that the substantive law should be the same on appeal as for decisions at first instance.

The point that is relevant to the present enquiry, however, is not that

74 The Administration of Workmen's Compensation in Ontario, Report of the Task Force, 1973, p.51.

the Board applies different criteria on appeal, but rather that there is no systematic output of information to ensure that people and companies affected by the initial decisions are informed of the criteria that would be applicable on appeal.

When a penalty assessment under S. 86 (7) is levied, the employer concerned receives a special notice of assessment (Form 585) showing the claims experience on which the assessment is based. Also included is a notice advising the employer that:

> "If in your opinion this assessment is improper, you may object in writing to the Assessment Review Section giving your reasons".

But that notice does not inform an employer of the possible grounds of appeal.

In most cases, this may not be a practical problem. When a company is coming close to a penalty assessment under S. 86(7), the Board will inform any appropriate safety association, and either at that stage or subsequently, the employer will probably be informed of the criteria applicable, and other aspects of how the system works. Similarly, if, following the initial decision an employer phones the Board or writes to enquire, he will probably come to learn of the possible grounds of appeal.

But safety associations do not cover all employers, and all employers do not make enquiries at the Board in response to initial decisions. Unless the adjudicative criteria applicable on appeal are systematically

communicated to an employer in every case in which a penalty assessment is levied under S. 86 (7), there is an obvious risk that smaller, less aggressive, or less well organized employers may suffer from assuming that the criteria applicable on appeal would be the same as the criteria applied at first instance.

An initial decision of the Board under S. 86 (7) goes to the employer, and to a safety association. It does not go to a union, and is not in any other way notified by the Board to the relevant workforce.

If an employer appeals, it is normal practice for the Board to ask for a report on the firm's performance from any applicable safety association. The union and the relevant workforce do not receive a copy of that report, or notice of the hearing.

A union once asked to attend a hearing of an appeal under S. 86 (7). The matter was referred to the Corporate Board for a policy decision, and the Board concluded that on an appeal relating to a penalty assessment, a union is not a party of interest.

Judging from the provisions of Bill 70 (which is still pending in the House) it would seem to be government policy to provide greater information to workers and union officials relating to health and safety conditions, and greater opportunities to participate in the discussion of these matters, than has been the practice in the past. It would seem consistent with contemporary thinking in occupational health and safety matters, therefore, to provide for notice to the

union, if there is one, or otherwise to the workforce, of any appeal under S. 86 (7), and an opportunity to be heard.

Occasionally a representative of a safety association will attend an appeal at the request of the employer. But safety association representatives do not usually attend.

5. Transfers of Costs

The costs of a claim may be transferred from one employer to another. This may also involve the transfer of costs from one rate group or class of employers to another. The statutory authority for these transfers is in Section 8 (9):

> "No employer in Schedule 1 and no employee of an employer in Schedule 1 or dependant of such employee has a right of action for damages against any employer in Schedule 1 or any employees of such employer, for an injury for which benefits are payable under this Act, where the employees of both employers were in the course of their employment at the time of the happening of the injury, but, in any case where the Board is satisfied that the accident giving rise to the injury was caused by the negligence of some other employer or employers in Schedule 1 or their employees, the Board may direct that the benefits awarded in any such case or a proportion of them shall be charged against the class or group to which such other employer or employers belong and to the accident cost record of such individual employer or employers".

Apart from transfers of costs between employers, there is of course also the possibility that the Board may become subrogated to a worker in respect of any right of action in tort against someone not covered

by the compensation system whose negligence resulted in the injury.

As a trigger to Board action under these provisions, the Form 7 includes the question:

> "Was any person not in your employ to blame for or involved in the injury?"

Upon receiving the Form 7, the adjudicator determines from the answer to that question, and any other information on the Form 7, whether there is any question of a transfer of costs or a third party action. If so, a copy of the Form 7 is sent to the Legal Department. There it arrives at an adjuster's office. If it appears to be an appropriate case for a subrogation claim, the adjusters proceed with that. Alternatively, if it appears to be an appropriate case for a transfer of costs between employers, the copy of the Form 7 is passed on to another member of the Legal Department who acts as adjudicator on the transfers of costs. (I will call him the "Special Adjudicator", although that is not his title at the Board).

Apart from the transfers that are triggered by this automatic process within the Board, requests for a transfer of costs also come in telephone calls and letters from employers.

In cases involving medical aid only, the Board does not initiate any transfers of costs except at the request of the employer.

The member of the Legal Department who adjudicates on the transfers of

costs first identifies the third party employer. Then he determines if that employer is or should be reporting to the Board. If so, he then proceeds with the investigation to consider a transfer of costs. If the firm should be reporting and is not, the Revenue Branch would also be notified for a firm file to be set up.

If the third party employer is not in an industry covered by Part 1 of the Act, the file would be referred back to the adjusters for a possible subrogation claim to be considered.

When the third party employer is covered by Part 1 of the Act, the special adjudicator first decides whether, on the evidence currently available, there is a prima facie case for a transfer of costs. If so, a letter is sent to the third party employer giving the background facts, and indicating that a transfer of costs is being considered. The third party employer is asked to show cause why there should be no transfer. A copy of the relevant section of the Act is included. If the third party employer makes no reply, the costs are transferred. If the third party employer replies objecting, the special adjudicator decides what kind of investigation is required. He may make telephone calls, engage in correspondence, or undertake a field investigation. The special adjudicator makes all the enquiries personally, including any field enquiries. In the course of field enquiries, he will contact the employers concerned, the worker, and any other witnesses, will view the scene of the events, take photographs or make sketches as may be required.

If the accident was investigated by the Department of Labour, a copy of the Inspector's report may also be obtained. Similarly if the accident was investigated by the police, a copy of the police report may be obtained.

When the third party employer has replied by letter, a copy of that letter is sent to the first employer if it is not too harsh. Otherwise it is paraphrased. The names of witnesses are made available to both employers. The special adjudicator carries the enquiries to the point at which he feels that a decision can properly be made, and then he makes the decision. (This procedure, incidentally, impressed me as one that could serve as a model for claims adjudication).

Where the decision is to transfer the costs, the third party employer is sent a composed letter telling him why the transfer is being made. The last paragraph of that letter informs him of the right to appeal. The original employer is notified by a form letter.

When the decision is not to transfer the costs, a composed letter goes to the original employer.

A decision relating to the transfer of costs can be appealed to the Assessment Review Committee.

The statistics relating to the transfer of costs for the period 26th January to 31st December 1977 were as follows:

1,062 possible transfers considered.

454 transfers made to another Schedule 1 employer.

608 cases, no transfer and/or no further action.

During the same period, 12 decision were appealed to the Assessment Review Committee, and 1 decision was changed. In one case, a further appeal was taken to an Appeal Panel of the Board.[75]

The procedure followed in relation to transfers of costs seem to meet the needs of the employers concerned for information, and for procedural due process. The only possible improvement that occurs to me is with regard to medical aid only claims. The reason why the Board does not initiate transfers of costs in these cases is not doubt that the compensation cost of the medical aid would probably be less than the administrative cost of conducting enquiries into a transfer of costs. The transfer provisions of Section 8 (9) may make sense when the compensation cost is high and the administrative cost of a transfer small by comparison. But the administrative cost of enquiring into possible transfers is surely not worth it in medical aid only cases.

The Board practice makes sense under the present legislation. The problem, however, is that the Board must initiate transfer proceedings at the request of an employer. Thus in the medical aid only cases, the current practice gives an unfair advantage to companies that are

75 All figures supplied by the Board.

familiar with the system and monitor their claims experience closely in comparison with other employers who do not. This is not a problem that could be solved by any improvement in information flow, because most employers would have no wish to become involved in the compensation system to that level of detail. Moreoever, the costs of the transfer process could still be much too high in relation to the amounts of compensation involved.

The solution that would seem to achieve the most fairness among employers, and to be the most economical for all concerned, would be an amendment to provide that there will be no transfers of costs under Section 8 (9) in medical aid only cases.

6. Actuarial Reports

The Board Actuary produces a report for the Board annually or as required. The main purpose of this report is to estimate future liabilities arising out of claims to date, and to estimate the adequacy of the reserves to meet those liabilities. This report is not published.

The conclusions of the Board Actuary are checked by an outside actuary who provides a certificate. That is published in the Annual Report of the Board. In addition, that actuary also provides a report to the Board that is not published. There have, however, apparently been no

requests for access to this report and the Board has not had to decide, therefore, whether it should be treated as a public document.

Unlike the legislation of some other provinces, the Workmen's Compensation Act in Ontario does not require any of the future costs of past claims to be met on a current cost basis. It adopts a principle of full funding[76] for the future costs of past claims, but it does not require rigid adherence to that principle at all times.[77] The actuarial reports are, therefore, of some importance in understanding the extent to which the full funding principle is maintained, and the extent to which the Board has exercised its various discretionary powers.

In provinces where compensation benefits are indexed to the cost of living, a possible objection to disclosure of the actuarial reports might be that they could include a prediction of future rates of inflation. It could be embarrassing, and possibly counter-productive in terms of anti-inflation policy, if an agency of a provincial government should be seen to publish a prediction of future inflation at a rate higher than the predictions currently being published by the federal government. But that argument has no application in Ontario. The actuarial reports here do not include any predictions of future inflation.

76 Section 84.

77 For example, the Board is allowed some leeway under Section 85.

With regard to legislative adjustments to compensation benefits in respect of past claims, the practice of the Board in Ontario is not to anticipate these in actuarial estimates, and not to include them in the calculations until the legislation has been passed. Publication of the actuarial reports would not, therefore, disclose any legislative intentions of the government, or any legislative advice of the Board.

It may be thought, however, that actuarial reports should be treated as a species of consultants' reports. Some comments on the publication of consultants' reports are included in the next heading.

7. Consulting Reports

From time to time, the Board engages outside consultants to advise on various aspects of Board operations. Similarly the Minister may, from time to time, engage outside consultants to advise on various aspects of the Act.

The consulting reports that result from this process are not usually made available to the public. Some may be of a technical nature, for example relating to computer systems, and therefore not of broad interest.

Requiring consulting reports to be available to the public might have some advantages in contributing to the pool of information and ideas available to those with a special interest in the W.C.B.. But it

could have some significant disadvantages.

Perhaps most important is the potential influence of any publication requirement on the selection of consultants. It may well be in the public interest that the Board should select consultants who will subject the topic under review to a most critical scrutiny, and who will be imaginative. A publication requirement might create a pressure on the Board to select consultants who could be relied upon for a more bland report.

Alternatively, a publication requirement could create a pressure on the Board to play safe by not seeking a consulting report at all. Participation in public debate can be very time-consuming. By obtaining consulting reports in confidence, the Board can be exposed to a range of imaginative ideas. But if every such exposure creates a risk of demands on Board time for participation in public debate, the Board would have to be more restrained, and more selective in the consulting reports that it could obtain.

While there are rational arguments for the practice of obtaining consulting reports in confidence, one would think that the Board (or the Minister as the case may be) ought to elect at the time of ordering the report, or shortly after receiving it, either to make it available to the public, or to treat it as confidential. It would surely be very unfair as a form of public debate if the Board (or the Minister as the case may be) should refer to a consulting report to explain or justify a position without at the same time making that report available to the

public.

8. Board Minutes

The Board maintains a Minute Book recording decisions of the Corporate Board on a variety of matters, including rule changes, investments, and any major revisions of Board administration. Decisions on more routine matters of administration are made by a Management Committee, and recorded in a separate Minute Book.

Proposals for change, including proposals for changes in Board rules, usually come to the Board in memoranda from senior staff. Each memorandum will explain the matter to be considered, and conclude with a recommendation. Supporting documents are often attached. If the proposal is approved, the memorandum will be stamped "approved", and the memo and accompanying documents sent back to the originating department for any necessary circulation to staff.

In addition, a Board Minute is produced. This will identify the topic being considered, any major concerns or points raised in the discussion, and the resolution of the Board. Any dissent is recorded if that is requested.

Meetings of the Corporate Board are held in private. An outside request for permission to be present for the discussion of a matter was once received, and was declined.

This does not, of course, mean that there is no outside input in Board decisions. Proposals for change may be included in the discussions held by officials of the operating branches of the Board with outside groups, and of course various meetings are held from time to time, either formally or informally, by members of the Corporate Board with outside groups. But any discussion among the members of the Corporate Board preceding a Board decision is in private.

Board officials to whom I spoke could not recall any request for public access to the Minute Book of the Board, and consequently the Board has not had to decide whether it is available to the public.

Possibly some analogy might be drawn here with the minutes of cabinet meetings. The public does not have any right of access to the minutes constituting the record of discussion. But as soon as cabinet decisions take the form of Orders-in-Council, the public has a right to see what decisions have been made.

With regard to the discussion part of Board Minutes, it would seem inevitable that publication or confidentiality must be decided by the Board. The control that the Board inevitably has over the selection of items to go in the discussion part of the minutes would preclude any external decision on publication or confidentiality.

With regard to the actual decisions of the Board, however, it might well be thought that the public should have a right to know what decisions the Board has made.

If there should be a legislated right of public access to Board decisions, while at the same time the Board should wish to keep the discussion part of the minute confidential, this would require records to be maintained differently from the current practice. Either the Minute Book would need to be abbreviated to the style of a catalogue of resolutions, or there would need to be a separate resolutions book. Moreoever, each resolution would have to be a self-contained statement that, for its understanding, would not involve a reference back to any preceding discussion, or a reference to any other document.

Another question, and one that has been central in the discussion of freedom of information legislation, is whether the memoranda containing staff recommendations to the Board, and the accompanying documents, should be available to the public. My impression is that, at least in relation to the W.C.B., this would be counter-productive.

As a practical matter, the staff memoranda would not be read by ordinary members of the public, and rarely by the news media. They would only be read on a regular basis by whatever lobby group has the interest and resources to maintain a continuous monitoring of Board operations. Thus disclosure of staff memoranda to the Board might tend to add to the lobbying power of whichever lobby group is already the most powerful, and thereby tend to undermine the capacity of the Board to withstand lobbying pressures.

Such pressures may operate not only at Board level but also at staff

levels. If individual members of staff are unable to express their views in confidence up the line of management to the Board on controversial issues, whatever lobby group has the resources for continuous monitoring of Board operations might be in a position to influence promotions, or at least might appear to be in that position. In any event, such disclosure could add to the lobbying pressures on staff with little likelihood of any counterveiling pressures to achieve an equilibrium.

9. Briefs to the Board

From time to time, various people or organizations submit briefs to the Board asking for changes in Board rules or practice. These briefs are filed at the Board by years. The Board regards circulation of briefs as a matter for those who produce them. It does not supply copies of a brief in response to enquiries.

Usually that is not a problem for the enquirer, because if someone has discovered the existence of a brief, he can usually obtain a copy from the organization that produced it. For example, trade associations, labour unions and professional associations are, nowadays, usually willing to send copies of their briefs to each other, and to make them available to the public.

Copies of all briefs received now go to the Joint Consultative Committee.

I have not come across any practical problems with regard to access to briefs. But there are two points of principle that might be considered. First, it might be thought inconsistent with ordinary democratic principles that any proposals for changes of system or of rules made to a government agency should be treated as confidential. If this view is accepted, any legislated requirement for public access might include all briefs asking for changes of system or changes of rules. In other words, there might be a statutory requirement that no brief be treated as confidential.

Again, the current practice of seeking copies of briefs from the organizations or people that produce them only works for someone who knows that a brief exists. It is no help to someone who wants to discover from the Board what briefs have been received. To be effective, therefore, any right of public access would need to be accompanied by a requirement that a list or index of briefs be maintained and be accessible to the public.

10. Joint Consultative Committee

Since 1976, a Joint Consultative Committee has been appointed by Order-in-Council to discuss the development of Board operations, and to make recommendations to the Board. The Committee consists of representatives of trade associations, representatives of organized labour, and others.

A Minute Book is kept of the Committee decisions. The recommendations of the Committee are communicated to the Board, with copies to the Committee members. Apart from this, both the minutes and the recommendations are treated as confidential.

Among the Board representatives to whom I spoke, it was felt that the confidentiality of Committee records would assist in the give and take of discussion that is necessary to arrive at a consensus. Publication might tend to encourage posturing, and to hinder compromise. This argument, however, would seem limited to any minutes or transcript of discussion. It would not seem relevant to the final recommendations.

If an analogy might be drawn from labour relations, it is commonly felt that an agreement can be reached most efficiently if the negotiations are kept confidential. But once the negotiations are ended, the subsequent agreement is usually published.

Among the management and labour representatives to whom I spoke, it was felt that the recommendations of the Joint Consultative Committee could be or should be published. The only reservation was that publication should be contemporaneous. There was an objection to a recommendation being treated as confidential for a period, and then subsequently published.

11. Statistics

The basic data relating to compensation claims, as well as assessment data and accounts, are fed onto magnetic tape, and these tapes are used for the statistical program of the Board.

Statistics of fatal claims are still recorded manually, and various departments or individuals within the Board still keep some manual statistics. But most of the statistics now produced by the Board are generated by a computer program.

The principal figures in the Board accounts, and other figures that the Board believes to be of general interest, are published in the Annual Report.

Apart from the figures that the Board publishes of its own initiative, it also tries to respond to requests for other figures or further breakdowns. The impression of the staff responsible for responding to these requests is that about 85% to 90% are met.

The data tapes from which the statistics are compiled are supplied by the Board to the Occupational Health and Safety Division of the Department of Labour, but with the names of workers blocked out.

Apart from the published statistics, the Board also provides a statistical program for the safety associations. The same statistics that are provided to the safety associations would be available to

anyone who asks, except for lists that identify the names of workers. Thus although unions do not receive the same statistics as the safety associations, I understand that this is because the unions have not requested this information, and not because of any unwillingness of the Board to provide it.

The Board will not supply information that would enable one firm to be compared with another, but the safety associations can make this comparison from the data that they receive.

It has sometimes been suggested that the Board should produce statistics on causes of injury. But that would be counter-productive, possibly even disastrous. In most cases, the data could only be coded from the Form 7, and the kind of enquiry normally conducted for completion of a Form 7 is not a suitable kind of enquiry to determine causation for preventive purposes. Any statistics of injury causation generated in that way would be more misleading than informative.

Among the labour and management representatives to whom I spoke, none could think, at least not on the spur of the moment, of any statistical information that they would like to receive that the Board is not providing. It might be helpful, however, to mention some possible opportunities for improvement in the statistical program of the Board that have occurred to me.

1) The data currently recorded on tape in respect of each claim include the initial diagnosis taken from the Form 8. But there is no

transmission to the computer tape of any subsequent change in diagnosis. If a revised diagnosis at some subsequent stage could be transmitted to the computer tape, possibly at the termination of temporary benefits, that might well make the tapes more valuable, particularly for medical research. I understand that the Board is considering this possibility.

2) It might be helpful if the Board could have available, in a form readable to the public, a statement of its statistical program, including:

a) the name of each data bank on tape;

b) the items of information recorded in each bank;

c) the coding frame for each item of information;

d) the coding specifications or other information indicating how the codes are applied.

This would enable people outside the Board to see for themselves what statistical breakdowns the Board could produce.

3) It might be helpful if, perhaps following some discussions with company officials, workers' representatives and others, the Board could decide upon a continuing set of statistical tables to appear in the Annual Report. For example, one set of breakdowns that I think would be of interest on a continuing basis would be a comparison of the statistics of claims files opened with those that are more serious, perhaps those in which benefits are paid beyond thirteen weeks.

4) There may be a need for some rechecking on the accuracy of the descriptive phrases that accompany statistical data. For example, the

frequency tables still refer to claims statistics as if they were "accident" statistics, which of course they are not. There are several independent variables that can increase or decrease the incidence of claims within a company that may be unrelated to any increase or decrease in the incidence of industrial disablement.

5) It might be helpful if, in claims matters, the appeals statistics could be related to the statistics of initial decisions. This is not easy because of the range of decisions that might be made on a claim, and it could never be done comprehensively. But it might be done to some extent, and it could well be useful in getting a more complete picture of the significance of the appeal system.

12. Publicity

The Board maintains and circulates a good supply of pamphlets and brochures containing basic information about the compensation system. There are general pamphlets for workers and employers, as well as specific pamphlets for particular situations.

The Board also contributes to public information by providing speakers for meetings organized by various organizations, and by organizing meetings at its own initiative. A strength of these presentations is that the speakers usually come from the operating departments of the Board, or from support departments that closely interact on a detailed basis with the operating departments, such as the counselling

specialists.

News releases are issued to mark special events, and the Board also produces more detailed articles containing hard-core information, currently including medical research papers.

The Annual Report of the Board is a catalogue of information, including statistics, and dealing in particular with activities and changes during the year under review. The Annual Report for 1976 contained 33 pages, plus appendices. It is a straightforward and orderly narrative of information without the distraction of photographs or other types of P.R. gloss.

Two ideas for possible improvement of the Annual Report are:

1) It might be helpful to include as an appendix a catalogue of the continuing publications of the Board, and of new publications issued during the year under review. Several of the information pamphlets issued by the Board include a schedule of other publications available. But this list contains only the publications of broad interest, not those of more specific interest, such as medical research papers. People with a special interest can ask for documents of that kind if they know what to ask for. But it would surely be helpful for the Board to record <u>all</u> available publications by listing them in a document like the Annual Report that people keep available for future reference.

2) Some of the most informative and most imaginative publications of the Board only have limited circulation in mimeograph form.[78] If one or two publications of that kind were included each year as appendices to the Annual Report, it would surely contribute to public understanding not only of how the system works, but also how the Board thinks and why.

The most frequent regular publication of the Board is the W.C.B. Report. This has a broad circulation among, for example, union officials, employers, and doctors. Anyone is placed on the mailing list on request.

Among the people to whom I spoke outside the Board, the W.C.B. Report did not seem to be a matter of interest or concern. Part of the explanation may be that at the time of my discussion, publication had been suspended, and no issue had appeared for several months. One comment I received was that the publication of questions and answers is an interesting way of conveying information. The only other comment was that there is too much self-praise.

The W.C.B. Report is a promotional magazine. It is clearly designed to

78 Two excellent publications of this type are:
1) Workmen's Compensation in Ontario. A 21-page mimeographed brochure published in 1978.
2) New Perspectives in Workmen's Compensation. Address by A.G. Macdonald to the Annual Conference of the Industrial Accident and Prevention Association, 6th April 1977.

elevate the public image of the Board, and like the news releases of the Board in recent months, a central message is that "We are doing a good job".

A possible criticism of these publications is that government agencies ought not to spend money in the promotion of their own self-image. For commercial corporations, it is a legitimate, though perhaps questionable, expenditure. But for a government agency, it might be thought more compatible with the democratic process simply to tell the public what it is doing, leaving people to decide for themselves whether that is good or bad.

There are, however, several responses that might be made. First, without such promotional literature from the Board, the public would not receive a cool statement of facts, but a distorted impression. This can come about in several ways.

1) Although the Board has been able to obtain some favourable publicity lately, it may still be generally true that the positive achievements of government agencies are seldom noticed by the news media, particularly if they are normal routine. But tragedy is news. A dozen cases of workers content with their treatment by the Board would never be considered newsworthy. But one case of apparent or real injustice could become a headline story.

2) Some of the critics of the Board might be seen as willing

to use propaganda techniques to exaggerate any failing in Board operation. For the Board to respond by using propaganda techniques to portray a picture of its successes might, therefore, be seen as a legitimate exercise in free speech.

3) Many critics of the Board see primarily the less fortunate side of Board operations. Workers who are happy, or at least satisfied, with their treatment by the Board do not generally go to union officials, or to other worker representatives. Workers' representatives tend to see primarily those who feel that their claims have been wrongly denied, those whose claims were delayed, or those who feel unjustly treated in some other way. At least a proportion of those complaints will be justified. Thus, the dark side of the Board operation is what workers' representatives see, and hence what they may describe.

For the Board to engage in publicity emphasizing its achievements might be seen, therefore, not as a propaganda exercise aimed at distortion, but as a contribution to public debate which, when read in conjunction with other views, produces a better balanced impression of the total picture.

Assuming, which might well be correct, that the W.C.B. Report has an informational and promotional value, there is a collateral danger that it may be of interest to mention, and that may require some attention. Once a need is recognized for image promotion, it is normal to perceive the fulfillment of that need as requiring an expert in public relations.

Hiring such an expert is what the Board has done. But there may be a natural tendency in all of us to have a better perception of the value of work of a kind that we produce ourselves than we have of work of other kinds. For this reason, hiring a public relations expert may not simply meet any perceived need for journalism; it may also expand the perceived need, possibly to the detriment of hard-core information.

For example, the last issue of the W.C.B. Report contained an article referring to new guidelines that have been drawn up for the adjudication of claims for industrial disease.[79] But it does not contain the text of the guidelines. That is the kind of judgment that I would expect a P.R. man to make. But it is the kind of judgment which serious readers of Board publications might well find exasperating.

Unless collateral vehicles are developed for the communication of hard-core information, the new P.R. program of the Board will not only fail to meet the need, but it may also contribute to an under-estimation of the need, and a distraction of resources from the need.

Two possible ways of distributing hard-core information that have been adopted by similar institutions elsewhere are:

1) To publish a collateral periodical report of hard-core information (such as new directives, guidelines, claims decisions, discussion papers, medical research papers, etc.) as a separate

79 Spring 1978, pp. 12-13.

publication and produced outside the P.R. department.[80]

2) To include both promotional material (including human interest stories and safety messages) and hard information in the same publication, perhaps in a separate section.[81]

The W.C.B. Report, as it now stands, may be useful for casual reading about the Board, for example, as light reading for patients in a doctor's waiting room. But it does not meet the need for hard information in a retrievable and indexed form to provide working tools for those who interact with the system.

There is, however, another problem affecting the image of any workmen's compensation board and that cannot be solved or even mitigated by any improvement in Board publicity. The distinction that the Act requires between disabilities that result from employment and those resulting from other causes is not a distinction that can always be made readily, or that will always appear justified as a matter of social policy. In cases involving multiple disability, or multiple causes of disability, it is hard for any compensation board to make that distinction to the satisfaction of others, or even to its own satisfaction. Moreoever, a large proportion of claims at the Board are "bad back" cases, many of

80 This is the structure in British Columbia.

81 This is what is done, for example, by the Accident Compensation Commission in New Zealand.

which involve disabilities resulting from the combined effect of multiple causes.

> "In some cases, a precise diagnosis is impossible, and for that reason alone the cause of the disablement cannot be established. Even when diagnosis is clear the etiology may still be uncertain. Where the etiology is clear, it is still commonly found that the disability has resulted not from any single cause but from the combined operation of several. Often the attempt to establish cause is complicated further when several disabilities are found to be having a combined effect on the same patient".[82]

Even when disabilities resulting from employment can readily be distinguished from those that do not, the distinction is still hard to justify. Making that distinction often requires the Board to focus an enquiry entirely on the past, while all the concerns of a disabled worker relate to the future. If one can imagine a worker with a genuine and serious disability, sitting across the table from one or three Board officials, he may well be concerned about the nature and extent of his disablement, its impact on his earning capacity, its negative influence on future employment, its impact on social mobility and family life, and the risk of further pain and deterioration. If he tries to explain these concerns, a Board official may have the miserable task of explaining to him their irrelevance to the present enquiry, and that the discussion must focus instead on the cause of disablement. It is surely unreasonable to expect a disabled worker to leave such an encounter feeling that he has been dealing with sensitive

82 "The Politics of Reform in Personal Injury Compensation" T.G. Ison, (1977) 27 University of Toronto Law Journal 385, 387.

and sensible people, operating a sensible system.

These are problems that can only be solved by major system changes[83] and that cannot be helped by any improvement in the flow of information from the Board.

13. Research

a) Epidemiology

It is very probable that the incidence of industrial disease is under-recognized and under-recorded.[84] This might well be having an adverse effect on the efficiency of claims adjudication as well as causing the need for preventive measures to be under-estimated.

As mentioned earlier, much of the data relating to individual claims are now recorded on magnetic tape, a form that is particularly useful for research in epidemiology. This research is needed by the Board for claims adjudication, as well as being desperately needed by others for the prevention of disease.

83 For my views on the type of change that is needed, see "Human Disability and Personal Income", being Chapter 15 of Studies in Canadian Tort Law, 1978, Ed. L. Klar, Butterworths.

84 Supra fn. 61

Thus the Board is both a potential contributor to research in epidemiology, and a potential user of the research results.

A serious limitation on the value of the data tapes at the Board for research in epidemiology is that the most critical data are taken from the initial reports (the Form 7 and the Form 8). There is no record on the magnetic tape of any subsequent change in diagnosis. The Board is, however, considering a revision of its recording systems that would result in the initial diagnosis being entered on the tape (possibly coded according to the international classification of diseases), and then subsequently updated at a later stage in the claim.

The use of individual medical records for purposes other than treatment is a matter on which there appear to be some differences of opinion within the medical profession. The organizations of the profession at large tend to emphasize the protection of privacy,[85] while those specializing in preventive medicine tend to emphasize the need for research.[86]

While there is no doubt public concern about the leakage of personal

85 See e.g. the Brief of the Ontario Medical Association to the Commission on Freedom of Information and Individual Privacy, July 1977.

86 See e.g. the Brief of the Ontario Cancer Treatment and Research Foundation to the Commission on Freedom of Information and Individual Privacy, August 1977.

medical information,[87] it could be disastrous if the response to that concern was one that operated to restrain research in epidemiology.

A perception of the different views within the medical profession is that:

> "...the apparent conflict of opinion within the medical profession regarding the confidentiality/use of medical records stems from a narrow perspective of the practicing physician which section speaks for the medical profession as a whole; the practicing physician is only aware of medical records as they pertain to his patient entries in his own office and as they pertain to entries into hospital records; both such entries relating to individual persons and each individual record being treatment oriented.
>
> The conflict of opinion amongst the medical profession is real and in a final analysis appears to stem from the fact that the profession in its overall objective seeks responsibility for the treatment of sickness rather than responsibility for the health of Canadians".[88]

A sensitive aspect of research in epidemiology is that commonly a project cannot be completed by the examination of only one data bank. The research may require record linkage of the data tapes from two or more banks. To achieve this record linkage, the researcher cannot use aggregated and anonymous data. He must have the identifying data for each individual record. For some projects to be successfully completed, the data on tape may also need to be supplemented by seeking further

87 For example, the public discussion about R.C.M.P. access to O.H.I.P. records.

88 Letter to the writer dated 5th May 1978 from Dr. C.A.R. Dennis, Executive Director of the Prairie Institute of Environmental Health.

information from the people concerned.[89]

A useful identifier for record linkage purposes is the social insurance number. This is requested by the W.C.B. in its forms, and is received in about 90% of claims.

A possible alternative to record linkage might be the construction of a national data bank for medical research, into which would be fed the records of existing systems (such as O.H.I.P., W.C.B., Vital Statistics, etc.). This could have a number of advantages. One would be that more research could be done on aggregated data without the researcher needing individual identifiers. Another might be that the management of a central data bank could exert an influence to achieve more comparability in the accuracy, classification and coding of input data.

Unless and until such a comprehensive data bank is designed, however, it is vital for epidemiologists to link existing records, and to have individual identifiers for that purpose.

Apart from individual identification being necessary for the conduct of research in epidemiology, it may also sometimes be desirable for communicating the results. Suppose, for example, a research project

89 For further discussion on the need for individual identifiers in epidemiological Research, see "Privacy Protection in Epidemiologic and Medical research: A Challenge and a Responsibility", L. Gordis et al, (1977) 105 American Journal of Epidemiology 163.

results in the conclusion that people with certain characteristics are vulnerable to serious risks. Access to a computer data bank could be most valuable to identify and notify the people concerned.

It is on the use of individual identifiers that the Ontario Medical Association has focussed its opposition to record linkage.

> "The O.M.A. appreciates the need for data collection for statistical purposes. We are supportive of the investigative work being done by the research community towards the understanding and control of various disease processes and in the field of epidemiology. However, we believe strongly that the information needs in these areas can and must be met through the use of medical records without patient identifiers. Society has more to lose through breach of confidentiality than it has to gain from potential enhancement of research if patient records transmitted and stored for statistical purposes retain patient identifiers.
>
> In unusual circumstances where patient identification is necessary for research purposes, records containing patient identification should be released only with the written consent of the patient after a proper explanation has been given".90

But the research method that may have the greatest potential in epidemiology, i.e. the linkage of various data banks, could not be done in that way. It would appear, therefore, that the effect of adopting that recommendation would be to stifle, or at least seriously restrain, research in epidemiology.

A possible cause of concern is that if patients can be identified in medical research, so too might attending physicians be identified.

90 Brief of the Ontario Medical Association to the Royal Commission of Enquiry into the Confidentiality of Health Records in Ontario, April 1978, p. 12.

There might, possibly, be some risk of embarrassment if the research results should indicate that previous medical opinions have been wrong, or that previous medical treatments have had unfortunate consequences.

The public interest in research in epidemiology is surely of paramount importance, and ought to be recognized in the development of any new rules for the protection of privacy. As the Younger Committee concluded:

> "...the prevention and cure of diseases are likely to be considered by most people as more important than the protection of personal privacy then the two come into conflict, as they obviously do at times".[91]

Canadian experience supports that view.

> "I did a study some time ago which potentially violated the confidentiality of information on an individual basis; this study was the precursor of all our accident studies, for two successive years I wrote to all individuals who had been hospitalized due to an accident during 1971 and 1972; there were approximately 16 to 17 thousand such accidents each year. I think our response was good. I do not recall one bad letter objecting to the sort of information that we were asking or to the fact that their names had obviously been identified as having an accident through the provincial hospital record system.
>
> .....
>
> Has the confidentiality of information contained in hospital records been violated in the three accident studies? I believe not, disabilities caused by grain augers are quite frightening but as long as the problem is not defined nothing can be done; farmers did not object to the study, in fact they welcomed the results. Should sections of the medical profession or other sections of our society deny to those at risk the adequate definition of risks and thus deny them the ammunition for

91 Report of the Committee on Privacy, 1972, Cmnd. 5012, para. 373 (U.K.)

minimizing that risk; I think not".[92]

The objection to record linkage for research in epidemiology is sometimes expressed in the principle that confidential information provided by a patient to an attending physician for the purpose of diagnosis and treatment ought not to be used subsequently for other purposes. To consider the strength of that argument in relation to epidemiological research, one might imagine a hypothetical conversation between doctor and patient following a history taking and physical examination. Suppose the hypothetical doctor concludes with the assurance that:

> "I promise you that what you have told me, and what I have discovered from my observations, will be used only for advising you on diagnosis and treatment, and that I will not allow it to be used by any medical researcher for the prevention of disease".

Possibly the public reaction might be one of gratitude to the medical profession for the protection of its privacy. But it is surely more credible that the public reaction might be one of shock at the apparent priorities in the goals and values of the profession.

As suggested earlier in this Chapter under heading 11, "Statistics", it could help to facilitate epidemiological as well as other research if the Board would make available to the public on a continuing basis a statement of its statistical program, including a statement of the data currently being recorded in machine readable form.

92 Letter to the writer dated 5th May 1978 from Dr. C.A.R. Dennis, Executive Director of the Prairie Institute of Environmental Health.

b) Other Medical Research

Apart from any possible use of the magnetic tapes, the files of the Board relating to individual workers, usually the clinic files, are made available from time to time to researchers outside the Board for study in connection with medical research projects.

c) Non-Medical Research

It has been Board policy to decline requests for access to claims files for non-medical research. Access to the files might, for example, be requested for research in sociology, law, ecomonics or labour relations.

There is a dearth of systematic study about the significance of the compensation system, its effect on people, and its effect on organizations. Although requests for access to the claims files for research purposes are unlikely to be frequent, it is surely in the public interest to facilitate academic research relating to the institutions of government.

Again, in relation to the legal system, it is an old adage that justice must not only be done, it must manifestly be seen to be done. In a system of adjudication in which individual cases are not exposed to public view, other ways to facilitate outside commentary on the system are all the more important.

There is, so far as I know, no real administrative difficulty. Obviously the Board could not allow current files on which decisions are being made to be diverted for research use. But most research could be done on files that have become dormant.

The real concerns of the Board relate to the protection of confidential information and the privacy of the individual. In this connection, it may be that Board policy evolved in the years when the universities did not have ethics review committees except in relation to medical research. In recent years, however, ethics review committees have been established in the Ontario universities for the scrutiny of research projects in other disciplines as well as medicine. A primary purpose of these committees is the protection of privacy, and to prevent individuals from being harmed by research projects relating to them.

Here again, the potential benefit from research projects using Board files could be enormous, and it is difficult to believe that there would be any public will that such research ought not to be done.

It might be thought that the Board could take a more relaxed view, at least of projects that have been passed by an ethics review committee of this kind.

14. The Minister

As mentioned in Chapter I.3. above, advice of the Board to the Minister on legislative policy is among the topics excluded from this paper. But I have been asked to comment on the relationship between the Board and the Ministry, and particularly the extent and nature of any guidelines, policy directives, or advice emanating from the Ministry on specific questions or cases.

The Board is established under the Act as an independent adjudicating tribunal. There are no regular connections with the executive branch of government in relation to claims,[93] and no system of policy directives.

The Board does, however, follow general government policy with regard to various matters of public administration, particularly on salary levels, staff benefits, and expenses.

The Annual Report of the Board is submitted to the Minister, and tabled by the Minister in the House. In Ontario, the Minister answers in the House for the Board.[94] Also, since 1974, the Chairman

93 Where a government employee is a claimant, then of course his department will have the same duties of reporting to the Board as any other employer.

94 At least during my Chairmanship, the Board in British Columbia did not answer questions in the House, but would answer members' questions outside the House. There were two earlier rulings of the Speaker supporting that position.

and other representatives of the Board have attended annually for questioning and discussion with a Committee of the House, and, subject to any absences for other duties, the Minister has been present with the Board for those occasions.

When a worker writes to the Minister, perhaps because of dissatisfaction with a Board decision, the Minister refers the enquiry to the Board. The Board either suggests a reply, or provides the information for a reply. The Minister is not normally involved in claims decisions, but does sometimes act as spokesman for the Board in the House, or in the media.

The regulation-making powers of the Board are subject to approval by Order-in-Council. But as explained above, this is not particularly significant. Beyond the terms of the Act, most of the operating rules of the system are contained in the manuals or other documents, not in regulations.

The Commissioners of the Board are appointed by Order-in-Council on the advice of the Minister.

The working dynamics of the relationship will obviously vary from time to time with the personalities and interests of the particular minister and the Chairman of the Board.

With the proliferation of administrative tribunals since the turn of the century, a question that has commonly been asked is whether a

tribunal is really independent to the extent prescribed in the relevant legislation. Does the tribunal really make its decisions with the independence anticipated in the Act, or is this a facade that enables ministers to make policy without appearing responsible for the consequences? There is no doubt that among the provincial compensation boards in the last fifty years, and even in recent years, there have been some grotesque examples of political interference. But for reasons that I will try to explain, I do not think that, in relation to the W.C.B., the question has any contemporary relevance to the development of freedom of information legislation in Ontario.

If the concern is with the risk of secret policy directives, it may be helpful to consider the kind of structure or climate in which they would be most likely to occur. One would surely expect the maximum risk of secret policy directives when legislation becomes out of accord with subsequent political pressures. That may well have been a risk when the Workmen's Compensation Act in Ontario was first passed. Indeed, the Act was designed to provide working people with a measure of insurance protection greater than that which some of the powerful interest groups of the day were willing to accept. Thus, after referring in his Final Report to some of the representations that he had received, Sir William Meredith concluded that:

> "In these days of social and industrial unrest it is, in my judgment, of the gravest importance to the community that every proved injustice to any section or class resulting from bad or unfair laws should be promptly removed by the enactment of remedial legislation and I do not doubt that the country whose Legislature is quick to discern and prompt to remove injustice will enjoy, and that deservedly, the blessing of industrial peace and freedom from social unrest. Half measures which mitigate but do not remove injustice are, in my judgment, to be avoided. That

> the existing law inflicts injustice on the workingman is admitted by all. From that injustice he has long suffered, and it would, in my judgment, be the gravest mistake if questions as to the scope and character of the proposed remedial legislation were to be determined, not by a consideration of what is just to the workingman, but of what is the least he can be put off with; or if the Legislature were to be deterred from passing a law designed to do full justice owing to groundless fears that disaster to the industries of the Province would follow from the enactment of it".[95]

It is axiomatic that the techniques of lobbying available to corporations (as contrasted with trades unions) are greater in the administrative processes of government and in routine legislation than in major legislative reforms. Thus with a Workmen's Compensation Act passed to reflect the feelings expressed in the passage quoted, there was an obvious risk that the political pressures which would prevail in the administration of the Act might differ from those that prevailed in its legislative passage.

In recent years, however, this divergence has been almost entirely eliminated by the higher rates of inflation. Unless compensation benefits are indexed to the cost of living, or indexed to the level of wages and salaries, the level of compensation benefits in real terms is constantly falling. Thus the government makes constant decisions either to allow that fall to occur, or to counteract it, wholly or partly, by legislated adjustments to the level of benefits. Since the level of benefits is subject to constant revision through routine

95 Final Report on Laws Relating to the Liability of Employers, W.R. Meredith, 1913, Ontario, p. xix.

legislation, any political pressures that may operate on the government of the day can find expression through that process rather than through political direction to the Board.

When compensation benefits are indexed to the cost of living, as they are in some provinces, it has obvious advantages for disabled workers. It helps to keep benefits constant in real terms during periods of inflation, and during periods in the lives of individuals when they cannot respond to inflation by the exercise of bargaining power. But the absence of indexing at least has the advantage that the public knows what decision the government is making on the level of benefits. With indexing, there is a risk that the political pressures of the time may find expression in more obscure ways.

One possibility that has been discussed in recent years is that a minister should have some power to issue a policy directive to an administrative tribunal, particularly to avoid any situation where the policy of the tribunal might conflict with a related policy of the government. It has sometimes been suggested that such directives should be permissible, provided that they are within the scope of the legislation, are in writing, and are published. While this idea might have some value in relation to other tribunals in Ontario, or in relation to some compensation boards in other provinces, I cannot see that it would have any potential value in relation to the W.C.B. in Ontario.

CHAPTER IV

THE CONTEXT AND STRUCTURE OF POSSIBLE FREEDOM OF INFORMATION LEGISLATION

1. Contemporary Trends at the Board

My first impression of the Board about ten years ago was that it was operating at levels of secrecy far in excess of anything that could be justified by the protection of privacy, or the protection of any other private or public interest. Indeed, this was a common feature of other compensation boards, and of other agencies of government. In recent years, there has been a demonstrable trend to eliminate the unnecessary secrecy, and to make the operations of the Board more visible. This is apparent both from the statements of the Board[96] and from what has been done.[97]

96 "...I would like to take the position that we must move steadily in this direction (greater disclosure of information) and that doing so will improve workmen's compensation and enhance the reputation of the agencies that administer it". Per M. Starr in a Panel Discussion on the Secrecy or Disclosure of Medical Information at the Association of Workmen's Compensation Boards 1974 Annual Conference, p. 8.
Again, the Chairman has more recently referred to "...our increased awareness of the need for open communication between the W.C.B. and the public we serve". W.C.B. Report, Spring 1978, p. 2.

97 For example, in the publication of the Disability Evaluation Rating Schedule, and more recently the publication of diagnostic criteria used in the adjudication of claims for industrial disease.

Areas in which the unnecessary secrecy still seems to linger have been mentioned above.

2. The Indexing of Information

While the Board has moved a long way from secrecy to openness, it is still feeling its way on the organization and administration of public access to information.

Except for material classified as confidential, anyone who knows what information he wants, or better still knows what document he wants, and knows where in the Board to ask for it, will most likely receive a positive response to his enquiry. But there is no systematic provision for serving the person who just wants to "find out what is available", or the person who just wants to browse through the rules and practices of the Board to find out how the system works. On these points, publication of the adjudicative manuals would go a long way, and I have mentioned some other particular areas in which new forms of indexing or labelling of existing information would be helpful.

It may be useful to consider, however, whether some outside participation in the indexing of Board information would be helpful, either in a regulatory role or in a service role. The thoughts that occur to me are:

1) The indexing of government information for public access is

rarely perceived as a priority matter by those who have operational responsibility for other kinds of output. If some new form of indexing government information is considered important, therefore, it might be well to have it done by some agency that specializes in the disclosure of information, and that does not have other responsibilities.

2) There may be some advantage if the indexing of information in various government departments and agencies is done in some co-ordinated way rather than leaving each to produce its own.

As well as some form of index of available information, another requirement is obviously the disclosure of the rules relating to disclosure.

At the moment, there are various Board Minutes relating to the disclosure or confidentiality of information. The Board tells people what its disclosure rules are in response to enquiries, and one can find them mentioned in articles and speeches. But they are not gathered in an organized way for anyone who wants to sit down and read what the Board rules are on the disclosure or confidentiality of information.

With the vast array of documents at the Board, many of them relating only to housekeeping routines, the Board could not possibly develop disclosure rules relating to most of them. What is being suggested

here, however, is not more rules; but simply that the disclosure rules that the Board already has, and whatever they may be for the time being, could usefully be gathered so that they can be read in an organized form.

3. Monitoring

In considering the possible design of any freedom of information and privacy legislation, insofar as it may relate to an organization like the W.C.B., it may be necessary to consider:

a) What kinds of issues should the Board be left to decide for itself without outside intervention;

b) What kinds of issues should the Board be left to decide for itself, but with some guidelines or service support from some other agency of government;

c) What legislative provisions should there be:

1) requiring the Board to make documents or information available to the public;

2) requiring the Board to keep documents or information secret, or to treat them as confidential, making them available only to specified categories of people.

Assuming that there will be at least some legislative requirements

relating to freedom of information and the protection of privacy, the next question would be how to assure the implementation of whatever decisions the Legislature may make.

A mechanism that has commonly been recommended, and sometimes adopted, is an appeal to the courts from the decision of any department or agency refusing access to documents or information. But that would hardly seem appropriate in relation to the W.C.B. It would be far too expensive, cumbersome and slow. It might be very difficult for any case to be presented to the court without legal representation, and both courts and lawyers are intimidating to many of the clientele of the W.C.B.

In relation to the W.C.B., there are no national security issues involved, or other questions of such gravity in the functioning of government as to require the ultimate decision to be reserved to the Minister.

With regard to the current position, both the Provincial Auditor and the Ombudsman have monitoring responsibilities in relation to the W.C.B., but neither has a role of adjudication.

One possibility is that for issues relating to the disclosure or confidentiality of information, a role of adjudication might be assigned to the Ombudsman. Another possibility would seem to be a new official or tribunal established for the purpose. In any event, I would think it important that, at least in relation to the W.C.B., the

official or tribunal with adjudicating responsibility should be readily accessible to the ordinary person who walks into the office off the street, as well as being accessible by mail and telephone.

Perhaps more important that the adjudication of any complaints or disputes would be some provision for monitoring on a systematic basis by an official from outside the agency to assure compliance with any legislated requirements for disclosure or confidentiality.

4. The Preparation of Documents

Any new freedom of information legislation might need to be accompanied by some new guidelines for the preparation of government documents. An obvious example is that there may be more need for care to avoid defamatory statements. But there is also a need for some mundane guide-rules to make government documents readable to the public, as well as to make them readable internally. For example:

> When the word "percent" or the sign "%" is being used in any narrative of facts, it must never be followed by a period. It must always be followed by a phrase indicating the percentage of what.

5. The Phasing of Reform

As I mentioned at the beginning, the Board has been most cordial and helpful in supplying information for the preparation of this report.

But I would still find it understandable if the Board, like any other agency of government, should be unenthusiastic about the prospect of freedom of information legislation.

There may be some advantage to the Board in that more legislative requirements could reduce the scope for complaints that the Board is disclosing too little or too much. But there may also be some of the ordinary human apprehensions about more of one's daily work being exposed to public view, including perhaps, for example, the risk that a memo, possibly written in haste to meet a deadline, and written for a particular purpose, may subsequently be exposed to critical commentary in a different context. But there are some more particular concerns that are relevant to the way in which any legislative requirements are brought into effect.

Some years ago, the compensation boards in the Canadian provinces were fairly static institutions with occasional bouts of reform. But the last decade has seen an acceleration in the pace of change in several areas of social insurance and social security. At the W.C.B. in Ontario, as well as in several other provinces, reform is not now an episodic event but a continuing process. The reform capability of an institution like the Board is, however, necessarily limited, and the Board must establish priorities in the allocation of that capability. Thus one difficulty with proposals, recommendations, or legislative requirements originating from outside the Board is that, like the present Commission, they may be concerned with only some aspects of Board operations. Hence they may generate a priority for those aspects that could differ from

the priority that the Board would assign to them in relation to other problems competing for the same resources.

Another view is that the reform capability of the Board might not be improved by an input of outside ideas because the real bottleneck comes in implementation. The executive time required for the implementation of change is often the time of people who are already under pressure with responsibilities for daily operations.

Finally, it would be natural to expect an institution like the Board to develop a managerial capability and structure by reference to perceived needs. Thus the categories of managerial skill available for the implementation of change would tend to be those required for changes that originate internally, rather than those required for changes that originate from outside.

For all of these reasons, there may be some apprehension about the risk of an outside demand for reform at a faster pace than the Board can develop the implementation capability.

I would think, however, that any apprehensions of this kind could be met by a staged process, consisting of:

1) the report and recommendations of the Commission;

2) consideration and decision by the government of the legislative and other measures that it wants to adopt;

3) the development of a phase-in program to arrive at whatever position the government has decided should be reached.

The only comment I would make now is that I think it vitally important for the phase-in program to be discussed before and during the legislative process, and to be <u>included</u> in the legislation. If the phase-in program was left to be decided subsequently, there would be too great a danger of the legislation being perceived as the beginning of a debate on what ought to be done, rather than as an end of that debate.

CHAPTER V

CONCLUDING COMMENTS

Apart from ad hoc enquiries, the Board is subject to several forms of permanent monitoring by outside agencies of government. Perhaps the most important are:

1) The Ombudsman. Complaints about W.C.B. decisions are now one of the largest categories of complaints received at the Ombudsman's office.

2) Judicial Review. In relation to the W.C.B., this is extremely rare. But one case[98] was significant in leading to the disclosure of file information for the preparation of appeals.

3) The Provincial Auditor.

None of these outside agencies, however, really provides any form of quality control, particularly over decisions made at first instance. The Provincial Auditor is concerned primarily with questions of economy and efficiency, and has not, at least so far, been involved in the quality of output. Judicial review has only affected the appeal

98 Supra fn. 8.

system, and similarly, the Ombudsman has so far been focussing primarily on complaints following the final level of appeal.

For the reasons explained above, it is suggested that the greatest need for any outside monitoring of Board operations relates to quality control for decisions made at first instance. That is an area in which freedom of information legislation can be of crucial significance.

If this report has ranged over a number of partly unrelated matters, it is because its purpose is not to investigate any pre-defined issue, or to pass a judgment on any particular matter, but rather to assist the Commission in its search for "ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario".

My task has been to focus on one agency, the Workmen's Compensation Board. While I hope that the discussion in this paper may be of some help in the development of disclosure and privacy policies in relation to the W.C.B., I understand that the Commission is interested in considering whether the ideas developed in the study of particular agencies or departments of government may have some broader use in the development of policies and legislation of general application in the public service.

It is not part of my mandate to consider whether any of the ideas suggested above has any broader application. But I understand that this may be considered in the next phase of the Commission's work.

APPENDIX A

Preface to the Claims Adjudication Manual of the Workers' Compensation Board of British Columbia

A major difficulty in understanding our system of workers' compensation has been the absence of one reference work in which anyone can find the operational rules of the system. This manual is intended to meet that need. The objective is to gather in one work the provisions of the Act, together with the rules contained in directives of the Commissioners, the rules evolved through decisions on appeals, and the established practice of the Board.

The writing of this manual is not an attempt to revise the rules. That is a function carried out by the Legislature and by the Commissioners as various matters come to their attention. Rather the manual is intended to collate, synthesize and organize under subject headings the rules that have been established at various times.

The work is not intended to supersede the *Workers' Compensation Reporter*. It is simply to gather in an organized way decisions previously announced in the Reporter series, together with legislative and other decisions relating to the same subject. Thus it is designed to provide only the rules or conclusions. For those interested in the reasons for the conclusions, references are given in the footnotes to the *Workers' Compensation Reporter* or other materials where the reasons might be found.

A main purpose of the work is to provide a working tool for those responsible for the adjudication of claims. While the decisions of the Legislature and of the Commissioners are currently available in some form, they have not so far been synthesized and organized under subject headings for easy reference. It is hoped that the work will also be helpful to those outside the Board concerned with claims, or who for other reasons are interested in the system.

The work may also help to facilitate reform. If reform is to proceed efficiently and intelligently, and be amenable to the democratic process, there must be available to the Board, the Minister, the various interest groups, the Members of the Legislature, and to the public at large, a presentation of the rules currently being applied.

The manual is a reference work rather than a code. There are therefore some obvious limitations on its use. First, it is not a statement by the Commissioners of their present views on all or any of the matters covered, and the publication of the manual is not a guarantee that the Commissioners will necessarily take the same view in future on all or any of the matters covered. Secondly, there will be many questions arising on which there have been no decisions by the Legislature or at the Board. On these matters that have not so far been considered, the manual makes no attempt to fill the gaps or to suggest answers.

It is proposed to keep the manual up-to-date with a loose-leaf replacement service. As new matters receive attention, rules may be made in areas in which none have existed before; and existing rules may be changed, modified or further refined. As this occurs, loose-leaf replacement pages will be issued.

Most of the work on the manual has been done by Mr. Nicholas Attewell, Research Assistant in the Rehabilitation Services and Claims Department. It would be helpful if a note of any errors or omissions, or any suggestions for improvement, could be directed to his attention.

Terence G. Ison
(Chairman W.C.B., 1973-1976)

Vancouver, B.C.
February, 1975

APPENDIX B

Anecdotal Comment on the Publication of Adjudicative Criteria

The compensation boards in the Canadian provinces have, from early times, used a Permanent Disability Rating Schedule. This is the schedule that ascribes percentage rates to listed disabilities. It is the schedule referred to in Section 42(3) of the Workmen's Compensation Act of Ontario.

Until 1973, the provincial boards treated the schedule as a confidential document. It was either treated as secret, or only circulated on a restricted basis.

Shortly after I arrived at the Board in British Columbia, I consulted eleven members of the staff, ranging from senior management to disability awards officers, about publishing the schedule, and I invited comments. All comments were negative. Some included reasons. Some included apprehensions of specified harm, and others mentioned apprehensions of unpredictable harm. I remained unconvinced of any likely harm. I also felt that the Schedule, being a species of delegated legislation, was part of the law of the province, and as such ought to be published. The decision to publish was as follows:

Decision of the Workers' Compensation
Board of British Columbia

Workers' Compensation Reporter, Vol. 1. p. 41.

Decision No. 9

RE PUBLICATION OF THE PERMANENT DISABILITY EVALUATION SCHEDULE

Practice Direction considered by:

T. G. Ison, Chairman
R. B. Carpenter, Commissioner
G. Kowbel, Commissioner

2nd October 1973

The Board has been considering whether it should make public its Permanent Disability Evaluation Schedule. This is the rating schedule currently used in the measurement of partial disability. Consideration of this matter came about at the initiative of the Board.

The practice has been to treat the rating schedule as a confidential document.

Consideration of publication did not come about in response to any perceived need, or to any assessment of the extent to which people will find it useful. It was simply a feeling that it is wrong in principle that documents having regulatory significance, or used as reference material in arriving at governmental decisions, should be treated as secret documents.

One objection to publication has been that the document is likely to be misunderstood. No doubt that is true. But if that was acceptable as a ground for secrecy not much of our statute law would be published. Secondly, it has been pointed out that the schedule is not regulatory in that it does not prescribe the percentage rate to be used in a particular case. It simply provides guidance by indicating a standard percentage rate for certain injuries. The adjudicator is still free to apply other variables in arriving at a final pension. For this reason, publication of the schedule without any explanation of its use would no doubt cause confusion. We regard this, however, as a reason for publishing an explanation along with the schedule rather than as a legitimate ground for secrecy. Thirdly, most pension awards are not adjudicated by reference to the schedule. For the most part, the schedule only covers injuries to limbs, hearing, and vision. Thus the majority of claimants are not likely to find the schedule informative. But again, we cannot see that as any reason for secrecy.

We start with the general proposition that in any democratic society, documents used as source material in the decision-making process should be open to public inspection unless there is special reason for secrecy. We see no such reason in this case.

The schedule has not actually been a total secret. In 1952, the schedule in use at that time was published in the Royal Commission Report[1], and we are not aware of any dire consequences. During the Royal Commission enquiry conducted by Commissioner C. W. Tysoe, a complaint was considered relating to the secrecy of the schedule. The Chairman of the Board at that time assured the Commissioner that "it is available to genuinely interested persons and has been so for the past six or seven years".[2] In our view, however, the distinction between those who are "genuinely interested" and others is one that can neither be justified nor effectively administered. A document used as reference material for making decisions that govern the lives of many ought not to be reserved for the gaze of a privileged few.

Apart from the issue of principle, we think there are practical advantages to be gained by publication. First, we feel that greater openness in the decision-making process is more likely to inspire the confidence of those affected by the decisions. It must be very difficult for anyone to have confidence in the justice of a decision if he is told simply that he has been fairly treated according to invisible criteria.

Secondly, the Board has under consideration the possibility of reform in its methods of measuring partial disability. In attempting to improve the system, we often benefit from the comments of those who see it from a different perspective. But the quality of critical comment is bound to be lower if those who express their views are not fully informed about the present system and its workings.

RESOLVED that:

1. The Permanent Disability Evaluation Schedule shall be treated henceforth as a public document.

2. A copy of the Schedule will be available at the front counter, and at the counter of every area office, and will be shown to any person upon request.

3. The Disability Awards Officer when making a pension assessment will, upon request, show the claimant a copy of the Schedule.

4. A copy of the Schedule will be sent to any person in response to a request in writing addressed to the Information Services Department of the Board.

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1. *Report of the Royal Commission on the Workmen's Compensation Act and Board*, 1952, British Columbia, p. 153.
2. *Report of the Royal Commission on The Workmen's Compensation Act*, 1966, British Columbia, p. 277.

About 6 months later, I invited comments from the same eleven people about the significance of publication. The only comment I received back was that being able to show people the Schedule sometimes makes it easier to explain decisions.

In 1974, the Board in Ontario made its schedule available to the public. Again, I am unaware of any resulting harm.

APPENDIX C

Decision of the Workers' Compensation Board of British Columbia

Workers' Compensation Reporter, Vol. 1 p. 1.

Decision No. 1

RE: PUBLICATION OF DECISIONS 6 July, 1973

Considered by T. G. Ison, Chairman; G. Kowbel, Commissioner; Commissioner R. B. Carpenter participated in the discussion of this matter but was not present for the decision.

The Board has considered whether and to what extent it should publish the reasons and decisions of the Commissioners on appeals relating to claims, and possibly also on other matters. The consideration of this came about at the initiative of the Board and not in response to any application.

The matter can be discussed in three parts: first, communications with individual claimants and their employers, second, the documentation required for internal use, and third, publication.

1. *Communication with Claimants and Their Employers*

Following the decision of an appeal, the practice is to write a simple letter in plain English explaining to the claimant and his employer the conclusion reached, and the reason for that conclusion. No doubt there is scope for improvement in the clarity of these letters, but it seems to be generally agreed that this is the most desirable style of communication, and this will continue.

2. *Documentation Required for Internal Use*

The current practice is that the decisions of the Commissioners are separately noted in the file, usually with reasons, and are thereby communicated to personnel who have previously worked on the case. They are not, however, systematically communicated to all personnel responsible for claims adjudication.

For the majority of appeals, the present system may well be satisfactory. These cases do not involve any reconsideration of matters of principle but rather the analysis and classification of the facts of a particular case to determine how the matter should be decided, following principles that are not in issue. To distribute all the decisions in cases of this type would not accomplish anything that would justify the allocation of the resources, although distributing to the staff a sample of such cases may be useful for illustration.

It is a different matter, however, when the decision of a particular claim involves a reconsideration of the policies pursued by the Board and the formulation of principles which can and should be followed in other cases of a like kind. For several reasons, the distribution of these decisions to all staff responsible for adjudication is highly desirable.

First, the views of the Commissioners on matters of policy and principle should be made clearly known to the staff, not left to be gleaned by rumour, surmise or speculation. Nor should the staff be expected to infer a collective view from the notes made by individual Commissioners in the course of deciding an appeal, and which remain on file. Our staff recognize that consistency is one of the elements of justice, and they recognize the need to bring decisions of the Claims Department into line with decisions of the Commissioners. But they can only do this by receiving an in-flow of decisions and reasons. Thus the distribution of reasons to the staff is essential not only to enable them to undertand the Commissioners' interpretation of the Act and

the evolution of policy, but also to understand the attitudes adopted in the approach to problems. The alternative is insecurity, mystery and bewilderment. Thus in relating to the staff, the Commissioners should play a role of leadership not only by way of instruction but also by way of example. In other words, the appeal system should itself be used as a device for reducing the need to appeal by exposing adjudication staff to the thinking and attitudes of the Commissioners, thereby increasing the probability that the same thinking and attitudes will be applied in the first instance.

Secondly, the Board is not required to follow precedent.[1] But precedent cannot be ignored. It is the intuitive response of an adjudicator when confronted with a problem at least to take into account what was done when a similar problem arose before. And if we were not to do that, we would immediately create a risk of the injustice that could result from claimants in like situations being treated differently. As a practical matter, our adjudicators do to some extent follow precedent. They have at their elbows digests of the decisions of the Commissioners under the English National Insurance (Industrial Injuries) Acts, and digests of the decisions reached on workmen's compensation matters in the United States. It is surely a paradox that, except for recollection, personal notes, or particular decisions, they do not have to hand in any organized form the previous decisions of the Commissioners of this Board.

Thirdly, the new appeal system established by Bill 130 passed at the last session of the legislature will bring into the adjudication process a variety of people who may not have had personal exposure to the previous decisions of the Board. Unless there is to be the most chaotic discrepancies in the decisions of different boards of review, they must receive some coordinating direction from the highest level in the appellate process, i.e. the Commissioners.

Fourthly, the collection and indexing of decisions and reasons would be an invaluable aid to the work of the Commissioners themselves. We have at the moment no systematic way of refreshing our own memories of our decisions and reasons in previous cases of a like kind, nor can we readily call to hand the recorded opinions of our predecessors in dealing with similar situations.

Another useful form of documentation would be a guidebook of principles applicable in claims adjudication. To a large extent, that is already contained in the training lecture series. A guidebook of this type is highly desirable. But for several reasons, it is not an alternative to the distribution of Commissioners' decisions.

First, the production and up-dating of an adjudication guidebook is a much easier task if the editor has available for working material a supply of the decisions and reasons of the appellate tribunal.

Secondly, it is only possible in a general guidebook to explain the principles applicable to the more usual cases. A record of decisions on individual claims together with reasons can, if supplemented by a good index, be a useful guide for dealing with the unusual.

Thirdly, the system must constantly be kept up-to-date and responsive to the needs of the times. To some extent, this can be done by simple changes of rule. But more important changes need explanation if they are to be thoroughly understood. Moreover in any system of justice or public administration, other changes come about through gradual shifts of emphasis or degree. For both of these reasons, it is not satisfactory to rely on amend-

ments to an adjudication guidebook as the sole vehicle for change. There must also be the distribution of reasons for decisions.

Fourthly, no system of rules or even guidelines can be devised with the prescience to foresee the complexity of factors that operate in situations covered by the Workmen's Compensation Act. Whatever rules or guidelines are formulated, there must always be an area of discretion. Hence a purpose in the distribution of reasons for decisions is not simply or even primarily the formulation of rules but rather to make clear the policies, standards and value judgments used in the discretionary determinations.

3. *Publication*

Once it is apparent, as it surely must be, that selected decisions of the Commissioners are source material by reference to which future decisions are made, it surely follows that those decisions and reasons must be available to the public. This matter can be seen not simply in the narrower context of workmen's compensation, but in the broader context of the public accountability of administrative agencies.

The complexities of urban society and other phenomena of our times have resulted in the lives of men being governed by a whole range of specialized administrative agencies. They are all part of our system of justice in the broader sense. Yet one of the essential elements of justice, if we are to distinguish ourselves from totalitarian regimes, is exposure to public view of at least a sample of the decisions reached and the reasons for those decisions. And the same conclusion would surely follow if social insurance systems are considered not as a branch of justice, but as a branch of public administration.

Of course there are practical considerations. The Board makes large numbers of decisions every day. Most of them cannot be published nor reasons formulated. More time spent explaining things means less time on other productive activity. A reasonable balance must be struck and some selection of decisions for publication is inevitable.

Even apart from the practical considerations, there must be other limitations on publication. The "public right to know" is one of the popular demands of our time, but so too is the "right to privacy". Much of the information on individual claims affects the private lives of claimants, and other data is treated as secret to preserve the inflow of information. But when there is no such justification, secrecy as a general policy is incompatible with the ideals of democratic government.

The privacy of individuals can be protected by not naming the claimants in any published reports, and by excluding any identifying data.

Apart from the major question of principle, there are also practical advantages to be derived from the publication of selected decisions. First, the publication of decisions and reasons should be of considerable assistance to those engaged in advising on appeals. It would help them to recognize what arguments are relevant and what are not. Moreover it would help them to identify and select the cases in which an appeal is appropriate. They will be able to spot the more readily decisions of the Claims Department or of a board of review that may seem out of line with previous decisions of the Commissioners.

Secondly, publication should enable the Board to receive more penetrating feedback and a better quality of critical comment. The Workmen's Compensation Boards of Canada have often complained that they are the victims of ill-informed criticism. But there is surely something inconsistent about the voicing of that complaint if, at the same time, the critics are not supplied with the material by which they might become better informed. Not only

would publication enable us to receive more detailed comments from labour and management organizations, but it may also in the long run enable us to receive the benefit of comment by scholars in the universities who, at the moment, are denied the supply of any useful material upon which they could work.

Thirdly, the publication of decisions should be a considerable aid in the processes of legislative change. Those responsible for new legislation will have more readily to hand a supply of material by which to keep informed about the operation of the system; and those who may wish to advocate change will be able to determine more effectively what decisions have been made, the reasons for those decisions, whether they wish to advocate a change in the results for future cases, and if so, just exactly what change they want to promote. To advocate some reform in law or change in the functioning of government is the right of every citizen. But it is a hollow right if he does not have ready access to the information by which to inform himself of what is and why.

Fourthly, those who are disappointed by the decisions relating to their claims may feel an understandable sense of grievance. But this is surely aggravated if there is not available to them, or more likely to their adviser, any material by reference to which they can recognize that the particular case has been dealt with according to general principles equally applied in like cases. Secrecy breeds suspicion, and suspicion undermines confidence.

> "Boards pay a high price in public reputation and standing when they do not bother to publish their decisions . . .
>
> Nowhere is this phenomenon better illustrated than in the current charges of scandal levelled at the Workmen's Compensation Board of Ontario. No one questions the need for the Board to have the power to penalize employers with bad safety records. Yet when this is done secretly and equally secretly huge penalties are compromised, it is inevitable that there will be charges of corruption."[2]

In recent years, administrative agencies have been the subject of considerable study, and the publication of reasons for decisions has been one of the topics covered. In this connection, the Franks Committee in England reported that:

> "In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; . . ."[3]

The Committee concluded that:

> "In relation to tribunals we have recommended the systematic publication of selected appellate decisions, . . ."[4]

Similarly in the United States, the Acheson Report recommended:

> ". . . the fuller, better organized, and more frequent publication of the guiding principles of administrative behaviour . . .
>
> As a broad proposition the Committee believes that written opinions are highly desirable attributes of administrative decisions in individual cases; . . ."[5]

In Ontario, the McRuer Report concluded that:

> "The publication of important decisions and reasons of tribunals would do much to promote uniformity of administrative procedure in the Province. This practice has been usefully followed by the Ontario Labour Relations Board and the Income Tax Appeal Board of Canada. We recommend that provision be made to make decisions of all tribunals in Ontario available not only to the government services but to the public as well."[6]

In the last Royal Commission on workmen's compensation in British Columbia, the report of Commissioner C. W. Tysoe discussed the failure of this Board to give adequate reasons for decisions to individual claimants, and concluded:

> "Undoubtedly this extraordinary reticence on the part of the Board was bound up with a general deliberate policy of non-disclosure. In carrying this policy as far as it has done and so that a workman is left in the dark as to why his claim is not allowed, the Board has made secrecy almost a fetish. This appears to be inherent in most bureaucratic bodies. The tendency of all of them is to operate in an atmosphere of mystery and concealment."[7]

That comment was made with regard to the provision of reasons to individual claimants. But it would surely be equally applicable to the total absence of publication.

Against this body of informed opinion, our researches have not discovered a single study by any committee or scholar that has considered this matter and which has concluded with a recommendation against publication.

A fear sometimes expressed is that greater openness may result in an increased risk of intervention by the courts. Indeed, it may well be that the willingness of some judges to ride over the privative clauses has done much to promote the very practices that judges are themselves prone to criticize. But memories of the English experience with workmen's compensation still survive, and the American experience is close to hand. We would expect strong opposition both from the labour movement and from management to any step that might precipitate a re-entry of the courts into the administration or adjudication of workmen's compensation. We do not feel, however, that this is at the present time a realistic fear. Whatever the reasons, attempts by the courts in recent years to intervene in workmen's compensation matters have not been significant or prolific, and we do not perceive of the judges of the common law courts as lurking in the wings anxious to pounce into a jurisdiction that the legislature has assigned to others.

Consultation with the organizations of labour and management with regard to the publication of decisions indicates support from those representing labour unions and from those representing management. However one management organization doubted the value of publication, and another disapproved on two grounds. The first was the risk of distortion in the news media, and the risk of trial by newspaper. Based on our experience in a related area, however, we do not believe that the news media will be much interested in carrying reports of this type of publication when the individuals concerned are not named. We are also concerned that if the risk of distortion, or the risk of trial by newspaper, was acceptable as a ground for secrecy, it would equally be applicable throughout the activities of government and throughout the administration of justice. To the extent that these risks are there, we feel that we must bear them rather than resort to a level of secrecy that is not in the public interest.

Secondly, an apprehension was expressed that the publication of decisions may add to the risk of undesirable pressure being brought to bear on the Board to reverse or modify its decisions. We feel, however, that the publication of decisions is more likely to deter than to stimulate any attempts at improper pressure.

It is recognized that the decisions and reasons of the Board will not be of interest to the general reader. The problems are specialized and the arguments

are sometimes too complicatd for those who do not maintain a continuing interest in the subject. The explanation to individual claimants will, therefore, continue to be in the form of a simple letter. But for those engaged in advising claimants and their employers, and for others with a special interest in workmen's compensation, it is hoped that the publication of decisions and reasons will be helpful.

RESOLVED: that the Board do publish selected decisions in cases decided on appeal to the Commissioners, and selected decisions on other matters. The publication will be available upon subscription at a rate estimated by the reference to the cost of printing and distribution.

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1. Workmen's Compensation Act, Section 82.
2. Per Professor H. N. Janisch of the Faculty of Law, Dalhousie University, in *Publication of Administrative Board Decisions in Canada*, 1972, Canadian Association of Law Libraries, London, Ont.
3. *Report of the Committee on Administrative Tribunals and Enquiries*, 1957, Cmmd. 218, p. 10.
4. *Ibid*, p. 76.
5. *Final Report of the Attorney General's Committee on Administrative Procedure*, 1941, United States, p. 29.
6. *Report of the Royal Commission Inquiry Into Civil Rights*, 1968, Ontario, Volume 1, p. 223.
7. *Report of the Commission of Inquiry on the Workmen's Compensation Act*, 1968, British Columbia, p. 331.

(1975) 39 Connecticut Medicine 33-34

Open Information and Medical Care: A Proposal for Reform

Budd Shenkin, M.D., and David C. Warner, Ph.D.

In a recent article[1] we proposed that patients should be routinely issued copies of all their medical records, both inpatient and outpatient. We argued that patients, physicians, and planners and administrators would all benefit from this change, since the conditions of open information and freedom of choice that prevail in the market would be introduced into the area of medical care. Here, we would like to recapitulate our arguments in brief, and relate some of the responses we have received.

Patients would come to know much more about their medical conditions, and their compliance with their physicians' recommendations would probably improve as a result. Care would be more continuous in emergency rooms when specialists were consulted, and when physicians had to be consulted away from home. Patients would be subjected to fewer repeat tests, would be required to repeat but little information, and would receive more complete and better informed care. They would have a greater capacity to exercise free choice. At present, the criteria for judging physician capability are limited and inaccessible to most patients. And patients are inhibited from freely changing physicians, in part, by the expense of new workups, and by the difficulty of ever returning to the original physician should the new one request the records. A patient's relationship with his physician would improve as unwarranted feelings of dependency could be reduced, and as patient familiarity with medical concepts could improve communication. Physicians would benefit as well. At present, they have only limited means of evaluating one another's performance. As a result, an incentive for practicing high-quality care is lost, and referring patients to other physicians of known competence is made more difficult. An effect of implementing our proposal would be the emergence of decentralized and voluntary peer review. After seeing several patients whom another practitioner had seen, in conjunction with their records, a physician could hardly help making an assessment of that physician's abilities and practice. In this way professional reputations would grow according to the concrete criteria of patient care. Anticipating this process, physicians would have a clear incentive to practice high-quality medicine, especially since the practices of the most reputable would probably increase. In many cases, favorable evaluation by a specialist of a primary practitioner's records, or vice-versa, would result in increased trust and more expeditious referral of the patient to the appropriate level.

The proposal would also provide physicians new opportunities to learn. Just as residents learn by caring for patients and observing how various specialists treat their patients after they themselves have done as much as they can, so physicians in whatever practice setting would have the same experience repeatedly. Furthermore, we think our proposal would make the practice of medicine more satisfying and fulfilling. Practitioners have recently become less satisfied with their role and status in society. One cause of discontent has been that professional prestige has centered around academic centers where scientific advances are made, and where articles published and rank achieved are convenient measuring rods. By contrast, practitioners have had happy patients and money to mark them as successful in the community at large, but these advantages have counted little within the profession. Two other sources of discontent have been specialization and discontinuity which have frustrated practitioners trying to provide for a patient's needs. Moreover, the strains in physician-patient relations have affected physicians probably even more than patients, since being a patient is only a part-time pursuit.

Decentralized peer review would ameliorate the strain. It would provide recognition of excellence in the practice of medicine, and hence enhance the prestige of being a practicing physician. Patient record and the care they reflected would become a source of pride open to the perusal of fellow professionals. The expected improvement in continuity would decrease frustrations, and improved physician-patient relations would add importantly to physician satisfaction.

Administrators and policy makers would be the third group of beneficiaries. They do not have the capacity easily to evaluate or control the appropriateness of medical care, nor have they been able to remedy such maladaptive forces as the drive for more and more physician specialization. Increasingly, they are turning to comprehensive organizational

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solutions that call for increased centralized decision making and an increase in provider aggregations, such as Health Maintenance Organizations, foundations for medical care, neighborhood health centers, hospital-based practices, Professional Standards Review Organizations, and comprehensive health planning. Most of these solutions would deliver more power to the prospers of reform.

Adopting the proposal would reduce fears about physician accountability and quality. Self-regulating, decentralized peer review would provide better individual assessments than centralized review, since reviewers could correlate the patient himself with the record, instead of merely checking its internal consistency. Both inpatient and outpatient records would be used, and information would be generated precisely at the points of usage—patients and colleague physicians. On the other hand, some functions of centralized peer review, such as standards setting, would not be pre-empted.

Physicians responding critically to the proposal have usually cited the inhibitions that would be placed upon their discretion. With the fatally ill patient or the suspected psychosomatic, they feel that enforced confrontation of the patient with these facts would be deleterious. We feel that although this might sometimes be true, the literature documents that terminal patients are most often treated quite inappropriately. Letting the patient know the truth overtly would be an overall improvement and would force family and physician to confront the problem openly, rather than denying it until it is too late to act. Clearly, however, this question should be investigated with empirical studies.

Both physicians and non-physicians objecting to the proposal have most often cited the probability of physicians evading the requirements. They feel that physicians would keep double records, use even more recondite circumlocations, and otherwise evade the requirements of full communication. We do not think this would happen, but this question, too, should be subject to investigation.

We have been surprised that our responses have been predominantly positive, not negative. Several practitioners have reported to us that they have been unilaterally sending their patients copies of their records. Although we believe that many of the benefits we foresee depend upon widespread adoption of the practice, none of our correspondents have reported dissatisfaction, although several have questioned the impact upon the patient. Documented experiments with the procedure at the Given Health Center at the University of Vermont, where the patient is given his own record to audit, have had positive results.[2] They found that 97% of the patients indicated less worry about their health after reviewing their record.

The proposal represents incremental rather than a comprehensive change; its implementation should improve medical care at once and exert a salutary influence on the system's continuing evolution. Despite the fact that the proposal promotes free communication and patient autonomy, it would not interfere with centralizing reforms, such as Health Maintenance Organizations and Professional Standards Review Organizations. On the contrary, autonomous influences are sometimes essential even with administered systems.

More specifically, countries with tightly organized medical-care systems tend to have different expectations in physician-patient relations—Sweden is a good example. If the United States is to evolve toward more formal organization, care will have to be taken to structure that system so that our own preference in physician-patient relations will be preserved (or resurrected). In addition, the United States has a traditional respect for family practitioners often lacking in other countries; we would be well advised to nurture this functional attitude. The proposal would contribute to preservation of both these positive qualities as our medical care system evolves.

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2. Richard E. Bouchard, Winston M. Eddy, Henry M. Tufo, John C. Twitchell, H. Cramer Van Buren, and Louise Bedford (all of the Given Health Center), "The Patient and His Problem Oriented Record." In *Implementing the Problem Oriented System*, Edited by JW Hurst and HL Walker, New York, MEDCOM Press. 1973.

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The following list of Research Publications prepared for the Commission may be obtained at the Ontario Government Bookstore in Toronto, or by mail order through the Publications Centre, 880 Bay Street, 5th Floor, Toronto, Ontario M5S 1Z8. Further titles will be announced upon their completion.

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